No. 04-597

Title:	Unitherm Food Systems, Inc., Petitioner v. Swift-Eckrich, Inc., dba ConAgra Refrigerated Foods
Docketed:	November 4, 2004
Lower Ct:	United States Court of Appeals for the Federal Circuit
Case Nos.:	(03-1472, 03-1473)
Decision Date:	July 12, 2004
Rehearing Denied:	September 14, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 2 2004	Petition for a writ of certiorari filed. (Response due December 6, 2004)
Feb 2 2005	DISTRIBUTED for Conference of February 18, 2005.
Feb 22 2005	DISTRIBUTED for Conference of February 25, 2005.
Feb 28 2005	Petition GRANTED limited to the following question: Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59.
Mar 25 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 13, 2005.
May 13 2005	Brief amicus curiae of United States filed.
May 13 2005	Joint appendix filed.
May 13 2005	Brief of petitioner Unitherm Food Systems, Inc. filed.
Jun 3 2005	Extension of time within which to file respondents' brief on the merits to and including July 15, 2005.
Jun 9 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jun 27 2005	Letter of ConAgra stating non-opposition to motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument received.
Jul 15 2005	Brief of respondent Swift Eckrich, Inc., dba Conagra Refrigerated Foods, et al. filed.
Jul 20 2005	SET FOR ARGUMENT on November 2, 2005.
Aug 5 2005	CIRCULATED.
Aug 18 2005	Reply of petitioner Unitherm Food Sys, Inc. filed. (Distributed)
Sep 2 2005	Motion of the Solicitor General for leave to participate in oral argument as

	amicus curiae and for divided argument GRANTED.
Sep 15 2005	Supplemental brief of respondent Swift Eckrich, Inc., dba Conagra Refrigerated Foods, et al. filed. (Distributed)
Sep 22 2005	Motion to strike respondent's supplemental brief filed by petitioner Unitherm Food Sys, Inc.
Sep 27 2005	Record received from U.S.C.A. for Federal Circuit. (1 box)
Oct 5 2005	Motion DISTRIBUTED for Conference of October 28, 2005.
Oct 6 2005	Exhibits received from Gregg Castro, Counsel for Unitherm Foods. (1 box)
Oct 12 2005	Record received from U.S.D.C. for Western Dist. of Oklahoma. (4 boxes) This record contains sealed documents.
Oct 14 2005	Exhibits received from Robert Schroder, Counsel for Swift-Eckrich, Inc.
Oct 31 2005	Motion to strike brief filed by petitioner DENIED.
Nov 2 2005	Argued. For petitioner: Burck Bailey, Oklahoma City, Okla.; and Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.) For respondent: Robert A. Schroeder, Los Angeles, Cal.

Supreme Court, U.S.
FILED
04-597 NOV 2-2004
OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT-ECKRICH, INC. d/b/a
CONAGRA REFRIGERATED FOODS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BURCK BAILEY
Counsel of Record
GREG A. CASTRO
JAY P. WALTERS
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820
(405) 232-0621

DENNIS D. BROWN
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
321 South Boston, Suite 800
Tulsa, OK 74103-3318
(918) 599-0621

Attorneys for Petitioner

190626

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the failure of a party to renew a motion for judgment as a matter of law following a jury verdict, in accordance with Rule 50(b) of the Federal Rules of Civil Procedure, precludes an appellate court from reviewing the sufficiency of the evidence.

LIST OF PARTIES

The Petitioner herein, Plaintiff-Appellee below, is Unitherm Food Systems, Inc., a corporation organized and existing under the laws of the State of Oklahoma. An additional Plaintiff in the United States District Court for the Western District of Oklahoma was Jennie-O Foods, Inc., now known as Jennie-O Turkey Stores, Inc. As Jennie-O's direct interest in this matter related only to the lower court's ruling on patent invalidity, and the validity of the patent is not implicated by this Petition, Jennie-O has no direct interest in this Petition.

The Respondent, Defendant-Appellant below, is Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Foods.

RULE 29.6 STATEMENT

The Petitioner has no parent and there are no publicly held companies that hold any stock of the Petitioner. Although not a Petitioner herein, Jennie-O Foods, Inc. (now known as Jennie-O Turkey Stores, Inc.) is a wholly owned subsidiary of Hormel Foods Corporation, a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	ix
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
THE RULE INVOLVED	1
STATEMENT OF THE CASE	1
1. The United States Circuit Courts Of Appeals Are Sharply Divided On The Question Presented Herein.	1
2. The Federal Circuit Applied The Minority View Of The Tenth Circuit To Deprive Petitioner Of Its Jury Verdict.	2
3. The Tenth Circuit Has Noted That The Law In Eight Circuits Conflicts With Its Law.	3

Contents

	Page
4. In Deciding The Instant Case, The Federal Circuit Noted That Its Law Would Require A Different Result.	5
REASONS FOR GRANTING THE PETITION	8
1. This Petition Presents A Pure Question Of Law Upon Which The Circuits Are Sharply Divided.	8
2. This Court Has Never Addressed This Question.	12
3. Previous Decisions Of This Court Strongly Indicate That A Post-Verdict Motion For JMOL Is Mandatory For Appellate Review Of Sufficiency Of The Evidence.	13
CONCLUSION	18

TABLE OF CITED AUTHORITIES

	Page
Federal Cases	
Adames v. Perez, 331 F.3d 508 (5th Cir. 2003)	3
Benner v. Nationwide Mut. Ins. Co., 93 F.3d 1228 (4th Cir. 1996)	4, 5
Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850 (Fed. Cir. 1991)	4, 5, 8, 10
Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212 (1947)	13, 14
Cross v. Cleaver, 142 F.3d 1059 (8th Cir. 1998)	3
Cummings v. General Motors Corp., 365 F.3d 944 (10th Cir. 2004)	3, 6
Dixon v. Montgomery Ward, 783 F.2d 55 (6th Cir. 1986)	4, 14
Duro-Last, Inc. v. Custom Seal, Inc., 321 F.3d 1098 (Fed. Cir. 2003)	6
Johnson v. New York, New Haven & Hartford R.R. Co., 344 U.S. 48 (1952)	14, 15

Page

Morrison Knudsen Corp. v. Firemen's Fund Ins. Co.,
175 F.3d 1221 (10th Cir. 1999) 4

Neely v. Martin K. Eby Constr. Co.,
386 U.S. 317 (1967) 15, 16

Nobelpharma AB, v. Implant Innovations,
141 F.3d 1059 (Fed. Cir. 1998) 6

Patel v. Penman,
103 F.3d 868 (9th Cir. 1996) 4

Patton v. Texas & Pacific Ry. Co.,
179 U.S. 658 (1901) 9

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.,
382 U.S. 172 (1965) 2, 3, 12

Varda, Inc. v. Ins. Co. of N. Am.,
45 F.3d 634 (2d Cir. 1995) 4

Velazquez v. Figueroa-Gomez,
996 F.2d 425 (1st Cir. 1993) 4

Weisgram v. Marley Co.,
528 U.S. 440 (2000) 16, 17

Page

Woods v. Nat'l Life & Acc. Ins. Co.,
347 F.2d 760 (3rd Cir. 1965) 4, 15

Zachar v. Lee,
363 F.3d 70 (1st Cir. 2004) 5

Statutes and Rules

15 U.S.C. § 15 2

28 U.S.C. § 1254(1) 1

35 U.S.C. § 102(b) 2

SHERMAN ANTITRUST ACT § 2, 15 U.S.C. § 2 ..... 2, 3

FED. R. CIV. P. 50 ..... 1, 11

FED. R. CIV. P. 50(a) 5, 10

FED. R. CIV. P. 50(b) ..... *passim*

FED. R. CIV. P. 50(c) 17

FED. R. CIV. P. 50(d) 17

Cited Authorities

Page

Other Authorities

9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 50.41 (3d ed. 2004) 5

9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 50.91[1] (3d ed. 2004) 10-11

9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 50.91[2] (3d ed. 2004 and Supp. 2004) 11

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Federal Circuit Decided July 12, 2004 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Federal Circuit Denying Petition For Rehearing Dated And Filed September 14, 2004 ..... 55a

Appendix C — Federal Rule Of Civil Procedure 50 . 57a

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Appendix A at 1a-54a) is reported at 375 F.3d 1341.

STATEMENT OF JURISDICTION

The Federal Circuit's judgment was entered on July 12, 2004. A timely Petition for Panel Rehearing and Rehearing En Banc was denied on September 14, 2004 (Appendix B at 55a-56a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE RULE INVOLVED

Rule 50, Federal Rules of Civil Procedure, is reproduced at Appendix C at 57a-60a.

STATEMENT OF THE CASE

1. *The United States Circuit Courts Of Appeals Are Sharply Divided On The Question Presented Herein.*

This Petition raises an important, recurring question of trial procedure and appellate review upon which the United States circuit courts of appeals are sharply divided: Must the losing party in a jury trial file a motion for judgment as a matter of law post-verdict to preserve sufficiency of the evidence for appellate review? Eight circuits answer yes, two answer no, and there are no clearly controlling precedents in the other circuits.

2. *The Federal Circuit Applied The Minority View Of The Tenth Circuit To Deprive Petitioner Of Its Jury Verdict.*

Unitherm Food Systems, Inc. ("Unitherm"), a manufacturer and supplier of equipment and processes used in the food industry, and Jennie-O Foods, Inc., a vendor of turkey products to the trade, sued Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Foods ("ConAgra") in the United States District Court for the Western District of Oklahoma alleging, *inter alia*, attempt to monopolize in violation of Section 2 of the Sherman Antitrust Act (a *Walker Process* claim), tortious interference with prospective business relations under Oklahoma law, and declaratory judgment for invalidity of a patent that had been issued to ConAgra. The trial court held on summary judgment that ConAgra's patent was invalid under 35 U.S.C. § 102(b) because the process claimed had been on-sale and in public use in the United States more than one year prior to the date of the application for the patent. The trial court left for jury determination the question of whether ConAgra had obtained the patent by committing fraud on the patent office.

Following eight days of trial, the jury returned a verdict in favor of Unitherm on the *Walker Process* claim in the sum of $6,000,000, which the trial court thereafter trebled pursuant to 15 U.S.C. § 15.[1] ConAgra did not file a motion for judgment as a matter of law ("JMOL") pursuant to Rule

1. The jury also returned a verdict in favor of Unitherm for compensatory damages on the tortious interference count in the sum of $2,000,000, plus $2,000,000 in punitive damages. Because the tort damages were subsumed within the antitrust damages, the trial court entered an agreed judgment for treble the amount of the SHERMAN ACT Section 2 damages and a stipulated judgment for attorney fees pursuant to 15 U.S.C. § 15.

50(b) following the jury verdict or the judgment. Instead, ConAgra appealed to the Court of Appeals for the Federal Circuit where it argued insufficiency of the evidence to support certain elements of Unitherm's *Walker Process* claim.

Even though the law of the Federal Circuit (and seven other circuits) clearly prohibits appellate review of sufficiency of the evidence in the absence of a Rule 50(b) motion post-verdict, the Federal Circuit applied Tenth Circuit law which is to the contrary.[2]

3. *The Tenth Circuit Has Noted That The Law In Eight Circuits Conflicts With Its Law.*

The Tenth Circuit case relied on by the Federal Circuit was *Cummings v. General Motors Corp.*, 365 F.3d 944 (10th Cir. 2004), where the Tenth Circuit noted:

> *We note that the vast majority of other circuits have held that the failure to renew a motion for judgment as a matter of law following a jury verdict precludes an appellate court from reviewing the sufficiency of the evidence. See Adames v. Perez*, 331 F.3d 508, 511-12 (5th Cir. 2003) (holding failure to file a post-verdict motion waives a sufficiency claim, limiting court to a review for plain error); *Cross v. Cleaver*, 142 F.3d 1059, 1069-70 (8th Cir. 1998) (holding, where a party fails to move for judgment as a matter of law following the verdict, the court

2. The Federal Circuit applied *its* law to determine whether a patentee's acts caused the patentee to lose antitrust immunity, and the law of the regional circuit to determine the remainder of the antitrust inquiry. (App. A at 31a-32a).

cannot test sufficiency of evidence beyond plain error to prevent a manifest miscarriage of justice); *Patel v. Penman*, 103 F.3d 868, 879 (9th Cir. 1996); *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 638 (2d Cir. 1995) (failure to make motion results in a waiver of challenge to sufficiency of evidence); *Velazquez v. Figueroa-Gomez*, 996 F.2d 425, 426-27 (1st Cir. 1993); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 862 (Fed. Cir. 1991) (concluding the "failure to present the district court with a post-verdict motion precludes appellate review of sufficiency of the evidence."); *Dixon v. Montgomery Ward*, 783 F.2d 55, 55 (6th Cir. 1986); *Woods v. Nat'l Life & Accident Ins. Co.*, 347 F.2d 760, 769 (3d Cir. 1965) ("A party's failure to file a motion for judgment n.o.v. in the trial court precludes an examination of the record by that court or this court for the purposes of ascertaining whether that party was entitled to a directed verdict.") *cf. Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996) (failure to move for judgment as a matter of law pursuant to Rule 50(b) limits the court's remedial powers, but not the ability to review for error). Despite the fact that our approach diverges from that taken by the other circuits, we are constrained to follow our prior precedent, as we are "without power to overrule the unequivocally contrary precedent of this Circuit." *Morrison Knudsen*, 175 F.3d at 1246 n. 34.

365 F.3d at 950 n.1 (emphasis supplied).

The cases cited above by the Tenth Circuit reveal contrary authority in the First, Second, Third, Fifth, Sixth, Eighth, Ninth, and Federal Circuit Courts of Appeals.[3] The law in the Fourth Circuit is the same as the Tenth Circuit. *See Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996). There are no cases squarely on point in the other circuits.

4. *In Deciding The Instant Case, The Federal Circuit Noted That Its Law Would Require A Different Result.*

In deciding the instant case, the Federal Circuit recognized that appellate review for sufficiency of the evidence is impermissible under its own jurisprudence, to wit:

> *ConAgra failed to renew its motion for judgment as a matter of law ("JMOL") after the verdict pursuant to Federal Rules of Civil Procedure 50(b). Unitherm contends that ConAgra therefore waived its right to dispute the sufficiency of the evidence supporting the jury's antitrust verdict. We have ruled as a matter of Federal Circuit law that, for issues unique to our jurisdiction, a 50(b) motion is necessary to preserve a sufficiency of the evidence argument for appeal. Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 859-62 (Fed. Cir. 1991). On most issues related to Rule

3. A recent First Circuit case discussing the issue is *Zachar v. Lee*, 363 F.3d 70, 73-74 (1st Cir. 2004) ("If the Rule 50(a) motion is denied and the case is submitted to a jury, the movant must renew the motion once again in order to preserve the issue for appeal. *See* FED. R. CIV. P. 50(b); 9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 50.41 (3d ed. 2003)").

50 motions, however, we generally apply regional circuit law unless the precise issue being appealed pertains uniquely to patent law. *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1106 (Fed. Cir. 2003). Because we decide antitrust issues that do not implicate patent law, including market definition, under the law of the regional circuits, *Nobelpharma* [*AB, v. Implant Innovations*], 141 F.3d [1059,] 1067 n.5 [Fed. Cir. 1998], we similarly apply Tenth Circuit law to determine whether or not ConAgra has preserved its right to appeal. In the Tenth Circuit, the failure of a party to move for a JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence, provided, as is the case here, that the party made the appropriate motion prior to the submission of the case to the jury. *See Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 950-51 (10th Cir. 2004). The absence of a Rule 50(b) post-verdict motion for JMOL, however, precludes our entering judgment in favor of ConAgra. "The only remedy available is a new trial." *Id.* at 951. Thus, we may only vacate the jury's verdict in favor of Unitherm."

(App. A at 50a-51a, footnote 7) (emphasis supplied).[4]

4. Contrary to the Federal Circuit's observation in the passage quoted above, that ConAgra "made the appropriate motion prior to the submission of the case to the jury," ConAgra did *not* make a motion *pre-verdict* contesting the sufficiency of Unitherm's proof of the relevant market, its proof of antitrust injury, or its proof of ConAgra's dangerous probability of successful monopolization. *Indeed, not a single word was uttered about these issues in the pre-*
(Cont'd)

The Federal Circuit proceeded to review sufficiency of the evidence: "ConAgra challenges the jury's factual findings. * * * We therefore review the sufficiency of the economic evidence that Unitherm proffered in support of its antitrust claim." (App. A at 45a-46a). In weighing the evidence on the issues of relevant market and antitrust injury (both of which the Federal Circuit noted were "intensely factual," App. A at 13a), the Federal Circuit concluded that, "The scant economic evidence in the record suggests strongly that [Unitherm's expert's] market definition is incorrect." (App. A at 48a). The Federal Circuit reversed Unitherm's antitrust judgment on the ground of insufficiency of the evidence.

The Tenth Circuit law applied by the Federal Circuit is contrary to Rule 50(b) and to this Court's precedents. The Federal Circuit erred as a matter of law in conducting appellate review for sufficiency of the evidence when ConAgra did not submit a post-verdict motion for JMOL pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

(Cont'd)
verdict motion for directed verdict by ConAgra's counsel. (A5232-5239, 5884). Regardless of this error by the Federal Circuit, the question presented by this Petition does not expressly address ConAgra's failure to make a proper Rule 50 motion at *any* stage of the proceedings. The question presented by this Petition is directed to the requirement of a Rule 50(b) motion post-verdict.

REASONS FOR GRANTING THE PETITION

1. *This Petition Presents A Pure Question Of Law Upon Which The Circuits Are Sharply Divided.*

This Petition presents a pure question of law that has significant importance to the way trials and appeals are conducted in the federal judicial system. There is no factual dispute here: ConAgra did not file a post-verdict motion for JMOL. Eight of the circuit courts of the United States squarely hold that such a motion is mandatory to preserve sufficiency of the evidence for appellate review. This Court has not been called upon to provide guidance to the bar and to the federal judiciary on this issue. This Court has noted, however, that the trial judge is uniquely suited to the task of evaluating sufficiency of the evidence because of having been an impartial participant in the trial. When a sufficiency of the evidence argument is raised for the first time on appeal, it works an injustice on the other party and the trial court also. It results, as happened here, in the trial court being reversed on rulings it did not make and was never asked to make. It unfairly prejudices the other party, as happened here, by preventing it from developing the record or taking other means to overcome such assertions. It fails to narrow the scope of the issues for appeal. It injects confusion, expense, and wastefulness into the judicial system.

These considerations were thoroughly discussed by the Federal Circuit in *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850 (Fed. Cir. 1991):

> The trial judge is best positioned to review impartially and in detail the evidence and events at trial, and, "our decisional approach is aided by the trial judge's review . . . setting forth his [or her] reasons for denying the motion for JNOV." [citations omitted.]

* * *

> Second, the jury may have been persuaded by many considerations beyond just the credibility of a witness that are not always adequately reproduced in a transcript. The district court "has the same opportunity that jurors have for seeing the witnesses [and] for noting all those matters in a trial not capable of record." *Patton v. Texas & Pacific Ry. Co.*, 179 U.S. 658, 660, 21 S.Ct. 275, 276, 45 L.Ed. 361 (1901).

* * *

> Third, a rule requiring presentation before the district court of a party's contention that a judgment lacks sufficient evidence promotes fair and equitable jurisprudence. The district court may take corrective action when confronted with error before an appeal is taken. "By failing to move for JNOV, the trial judge was denied the chance to correct any error by the jury." . . . Surely, avoidance of unnecessary appeals is to be encouraged. . . . When, as here, the appellant cites only testimony in support of its position, this disparity in opportunities is exacerbated. The post-verdict motion thus functions as a timely notice to benefit the appellate process, because briefing and argument are more likely to be informed and informative when the issue has already been joined in post-verdict argument.

* * *

> In sum, we conclude that we cannot review the sufficiency of the evidence after a jury verdict absent some post-verdict disposition, either by a deferred ruling or upon a post-verdict motion. Biodex's failure to present the district court with a post-verdict motion precludes appellate review of sufficiency of the evidence.

946 F.2d at 859-62.

Until 1991, Rule 50(a) referred to the *pre-verdict* motion as one for directed verdict; the *post-verdict* motion provided for in Rule 50(b) was known as the judgment notwithstanding the verdict — more commonly referred to in its Latin form, "*judgment non obstante verdicto*," or "j.n.o.v." In the original version of Rule 50(b), the j.n.o.v. had to be filed ten days after reception of the verdict. In 1963 this was changed to ten days after entry of judgment.[5] In 1991, the modern term JMOL replaced both the motion for directed verdict and the motion for j.n.o.v.[6] Frequently cited treatises on federal procedure flatly declare that a post-verdict motion for JMOL is required to preserve appellate review of sufficiency of the evidence. For example, MOORE'S FEDERAL PRACTICE states:

> Proper pre-verdict and renewed motions for judgment as a matter of law are prerequisites to

5. Even though this change in Rule 50(b) calling for filing j.n.o.v. post-judgment instead of post-verdict was made many years ago, the caselaw still typically refers to this motion as having to be made "post-verdict" rather than post-judgment.

6. The Advisory Committee Notes to the 1991 Amendment states: "This provision also retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment."

> appellate review of the sufficiency of evidence supporting a verdict. Thus, a party's failure to properly assert pre-verdict and renewed motions for judgment on the basis of insufficient evidence ordinarily waives the right to challenge sufficiency of the evidence on appeal. The policy underlying this rule is sound: federal appellate courts do not directly review jury verdicts. A party should not be permitted to gamble on the verdict and later question the sufficiency of the evidence leading to the party's defeat on appeal.
>
> Specifically, appellate review of the sufficiency of the evidence under Rule 50 may be precluded when a moving party:
>
> * * *
>
> Fails to renew the motion for judgment after entry of judgment in a timely manner (§ 50.41).

9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 50.91[1] (3d ed. 2004).[7] The law on this issue should be uniform throughout the federal judiciary. A failure to have uniformity is even more problematic with reference to the decision-making of the Federal Circuit, a court with nationwide jurisdiction in specific areas of law. The Federal Circuit applies its own jurisprudence in certain areas assigned to its control (as it did here), but it alone applies the law of the regional circuits to issues outside its exclusive control. Thus, the inevitable, unavoidable result is that lawsuits based

7. MOORE'S notes the minority view of the Tenth Circuit in *Cummings*. 9 MOORE'S FEDERAL PRACTICE § 50.91[2] (3d. ed. Supp. 2004).

on the same causes of action will be decided under conflicting rules. If the trial at issue here had occurred in one of the eight circuits other than the Tenth Circuit, the result would have been different. Petitioner respectfully submits that this is intolerable and should be remedied by this Court.[8]

2. *This Court Has Never Addressed This Question.*

This Court has addressed the issue of what a court of appeals can and cannot do in determining sufficiency of the evidence when the verdict loser *files* a post-verdict motion in the trial court pursuant to Rule 50(b), but this Court has never addressed the issue of what a court of appeals can and cannot do in determining the sufficiency of the evidence when the verdict loser does *not* make a post-verdict motion. Without this Court's definitive guidance, the outcome depends on the geography of the trial. Given the ever-increasing interstate and intercircuit nature of business and the practice of law, such unwarranted geographic distinctions invariably create inconsistency and confusion.

---

8. In *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), this Court created nationwide jurisprudence providing a remedy under the antitrust laws when a party fraudulently obtains a patent and uses it to put competitors out of business. But the ruling by the Federal Circuit in this case means the procedural rules, safeguards and fairness underlying *Walker Process* claims are not the same nationwide. The law pertaining to a nationwide cause of action should not be different in one federal forum than another. The question presented in this Petition applies, of course, to all cases tried in federal courts, not just *Walker Process* cases.

3. *Previous Decisions Of This Court Strongly Indicate That A Post-Verdict Motion For JMOL Is Mandatory For Appellate Review Of Sufficiency Of The Evidence.*

Previous decisions of this Court strongly indicate that a post-verdict motion for JMOL is mandatory for appellate review of sufficiency of the evidence. The law applied by the Federal Circuit to deprive Unitherm of its antitrust judgment thus violates the spirit, if not the letter, of decisions of this Court. This Court's jurisprudence on Rule 50(b) is primarily contained in four cases. In *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), respondent moved for new trial post-verdict but *not* for j.n.o.v. The court of appeals determined that petitioner's evidence was insufficient and directed that judgment be entered for respondent. This Court described the question on certiorari as follows:

> The petition for certiorari challenged the power of an appellate court to direct entry of a judgment notwithstanding the verdict where timely motion for such a judgment had not been made in the District Court.

Id. at 214-15. This Court stressed the importance of giving the trial judge the opportunity to address post-verdict motions for sufficiency of the evidence, as follows:

> Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) *calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.*

Id. at 216 (emphasis supplied).

This Court unanimously held that the court of appeals could not direct judgment for the respondent in the absence of a Rule 50(b) motion for j.n.o.v.

> In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

Id. at 218.[9]

In *Johnson v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 48 (1952), respondent moved for a directed verdict at the close of evidence. The trial court reserved decision on the motion and submitted the case to the jury, which returned a verdict in petitioner's favor. Within ten days of the verdict, respondent moved to have the verdict set aside. The trial court denied this motion and also denied the pre-verdict motion for directed verdict.

The court of appeals reversed, holding that the motion for directed verdict should have been granted because petitioner's evidence was insufficient to support the verdict. In reversing the court of appeals, this Court stated:

> On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a

9. The Sixth Circuit read *Cone* as requiring a post-verdict motion to preserve sufficiency of the evidence for appellate review. *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986).

> verdict the rule forbids the trial judge or an appellate court to enter such a judgment.

Id. at 50.

This Court held that respondent's post-verdict motion to "set aside" the verdict was not the equivalent of a motion for judgment notwithstanding the verdict — and therefore the court of appeals did not have the power to direct such relief. This Court also held that the trial court's reservation of decision on the motion for directed verdict did not relieve the respondent of its duty under Rule 50(b) to renew its motion within ten days after verdict.

> The rule carefully sets out the steps and procedures to be followed by the parties as a prerequisite to entry of judgments notwithstanding an adverse jury verdict.

Id. at 51.

* * *

> *The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness.*

Id. at 53 (emphasis supplied).[10]

In *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), respondent moved for directed verdict at the close of petitioner's evidence and again at the close of all the

10. The Third Circuit read *Johnson* as requiring a post-verdict motion to preserve sufficiency of the evidence for appellate review. *Woods v. Nat'l Life & Acc. Ins. Co.*, 347 F.2d 760, 769 (3d Cir. 1965).

evidence. The jury returned a verdict in petitioner's favor. Respondent then *moved for j.n.o.v.*, which the trial court denied. The court of appeals held the petitioner's evidence was insufficient and reversed with instructions to dismiss. This Court held that where the respondent *had* filed a post-verdict motion for j.n.o.v. and the record had been fully developed in the trial court, the court of appeals was within its power to direct entry of judgment for respondent. The outcome, therefore, buttresses the position that a post-verdict motion for JMOL is required before an appellate court may review sufficiency of the evidence.

In *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), respondent moved for JMOL at the close of petitioner's evidence and at the close of all the evidence, on the ground that Petitioner's expert witness testimony had been improperly admitted into evidence under *Daubert*, and that petitioner's evidence was otherwise insufficient. The jury returned a verdict in petitioner's favor, and respondent filed a post-verdict motion for JMOL on the same grounds. The trial court denied the post-verdict motions. The court of appeals held the expert witness testimony had been improperly admitted in violation of *Daubert*, and that petitioner's remaining evidence was insufficient. The court of appeals directed entry of judgment for respondent.

The difference between *Neely* and *Weisgram* is that the evidence was insufficient in *Neely* and the evidence *became* insufficient in *Weisgram* when the improperly admitted evidence was excluded. This Court found this distinction did not require a different result and affirmed. *Weisgram* emphasizes the importance of the trial judge's ruling on a post-judgment motion for JMOL, and appears to read *Neely*

as requiring a Rule 50(b) post-verdict motion for appellate review of sufficiency of the evidence, *viz*:

> The remainder of the *Neely* opinion effectively complements Rules 50(c) and 50(d), providing guidance on the appropriate exercise of the appellate court's discretion *when it reverses the trial court's denial of a defendant's Rule 50(b) motion for judgment as a matter of law*.

528 U.S. at 450 (emphasis supplied).

* * *

> As *Neely* recognized, appellate rulings *on post-trial pleas for judgment as a matter of law* call for the exercise of "informed discretion," 386 U.S. at 329 and fairness to the parties is surely key to the exercise of that discretion.

Id. at 454 (emphasis supplied).

In the foregoing cases, this Court appears to assume that a post-verdict motion for JMOL is required for appellate review of sufficiency of the evidence. But this issue was not expressly addressed by this Court, because in every instance a post-verdict motion for a new trial or for JMOL *had* been submitted by the verdict loser. In the instant case, the Federal Circuit did not discuss or even cite any of this Court's Rule 50(b) jurisprudence. The opinion by the Federal Circuit in the instant case results in a different outcome depending on the randomness of where the trial occurred.

CONCLUSION

The split in the United States circuit courts of appeals on this fundamental issue of trial procedure and appellate review presents a critical need for guidance by this Court. Petitioner submits this Court should review and reverse the decision below and articulate clear guidelines on the application of Rule 50(b) for appellate review of sufficiency of the evidence. The question in this Petition presents an important and recurring issue of federal law.

For all of the above reasons, Petitioner respectfully submits that this Court should grant this Petition to resolve this issue.

Respectfully submitted,

BURCK BAILEY
Counsel of Record
GREG A. CASTRO
JAY P. WALTERS
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820
(405) 232-0621

DENNIS D. BROWN
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
321 South Boston, Suite 800
Tulsa, OK 74103-3318
(918) 599-0621

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED JULY 12, 2004

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1472, -1473

UNITHERM FOOD SYSTEMS, INC.
and JENNIE-O FOODS, INC.,

Plaintiffs-Appellees,

v.

SWIFT-ECKRICH, INC.
(doing business as Conagra Refrigerated Foods),

Defendant-Appellant.

DECIDED: July 12, 2004

Before SCHALL, GAJARSA, and LINN, *Circuit Judges*.

GAJARSA, *Circuit Judge*.

Swift-Eckrich, Inc. (d/b/a ConAgra Refrigerated Foods) ("ConAgra") appeals the judgment of the United States District Court for the Western District of Oklahoma following a jury verdict, granting the claims of Unitherm Food Systems, Inc. ("Unitherm") and of Jennie-O Foods, Inc. ("Jennie-O") (collectively, "plaintiffs") that ConAgra was liable for attempted monopolization and for tortious interference with

prospective economic advantage, and that same court's earlier partial summary judgment finding U.S. Patent No. 5,952,027 ("the '027 Patent") invalid and unenforceable under 35 U.S.C. § 102(b)[1] and dismissing ConAgra's counterclaim for infringement. *Unitherm Food Systems, Inc. & Jennie-O Foods, Inc., v. Swift-Eckrich, Inc.*, Case No. CIV-01-347-C (W.D. Okla, March 27, 2003).

The district court construed the disputed claim terms in the '027 Patent correctly, and properly found the '027 Patent invalid and unenforceable for reasons of both prior use and prior sale under 35 U.S.C. § 102(b). The district court was also correct, under Oklahoma law, in allowing the jury to decide the issue of tortious interference and in accepting the jury's findings on both liability and damages. The district court erred, however, in allowing the jury to decide Unitherm's antitrust claims despite the total absence of economic evidence capable of sustaining those claims. We therefore affirm-in-part, vacate-in-part, and remand to the district court for further proceedings consistent with this opinion.

---

1. "A person shall be entitled to a patent unless . . . the invention was . . . in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States. . . ." 35 USCS § 102(b).

BACKGROUND

A. The '027 Patent

On May 11, 1998, a ConAgra engineer named Prem Singh filed a patent application for "A Method for Browning Precooked Whole Muscle Meat Products" with the United States Patent and Trademark Office ("PTO"). That application became the '027 Patent, which the PTO issued to Singh on September 14, 1999. Singh assigned the patent to ConAgra.

In early 2000, ConAgra wrote to several companies who sell equipment and/or processes for preparing and browning pre-cooked meats. ConAgra attached a copy of the '027 Patent to that letter, which included the explicit warning: "Others in the industry may approach your company regarding this patent, and we would appreciate it if you would inform them that we intend to aggressively protect all of our rights under this patent."

Unitherm, which describes itself as "a manufacturer and supplier of equipment and processes used in the food industry," did not receive one of ConAgra's letters. Unitherm, however, believed—and asserts as the basis of this suit—that its President, David Howard, had conceived the process claimed in the '027 Patent and reduced it to practice as the "Unitherm process" no later than September 1993.

In July 2000, ConAgra sent out another round of letters, this set to its direct competitors in the pre-cooked meats business. ConAgra attached both a copy of the patent and a blank license to this letter, and announced that it was "making

the '027 Patent and corresponding patents that may issue available for license at a royalty rate of 10¢ per pound, adjusted for inflation, to all responsible parties who have not infringed these patents." No one licensed the '027 Patent on these or any other terms.

Jennie-O (a division of Hormel), a direct ConAgra competitor in the pre-cooked meats business, received one of these letters. Some time earlier, Jennie-O had installed Unitherm equipment at its plant in Montevideo, MN, where it used the Unitherm process to brown roughly 18,000,000 pounds of meat per year. Upon receiving ConAgra's letter, Jennie-O undertook an investigation to determine its rights and responsibilities. Jennie-O executives later testified that their investigation led them to conclude that the Unitherm process and the '027 Patent process were one and the same, that David Howard had invented that process no later than 1993, and that unless a court invalidated the '027 Patent, Jennie-O would be infringing it by using the Unitherm process. According to Jennie-O executive Robert Wood, ConAgra's letter had "a chilling effect on any further possibility of Unitherm selling its products to Jennie-O."

On February 23, 2001, Unitherm and Jennie-O together sued ConAgra alleging numerous causes of action. Only three causes of action are relevant to this appeal: (1) a Declaratory Judgment Action for invalidity and unenforceability of the '027 Patent; (2) a state law claim for tortious interference with Unitherm's prospective economic relationships; and (3) Unitherm's *Walker Process* claim that ConAgra violated

Section 2 of the Sherman Act.[2] All of the plaintiffs' other claims were either dismissed or otherwise resolved in ways that the parties do not appeal. In addition, ConAgra counterclaimed that Jennie-O infringed the '027 Patent. The district court granted Jennie-O summary judgment of noninfringement. ConAgra does not appeal the summary judgment of noninfringement.

B. Summary Judgment of Invalidity

Both parties moved for dismissal of and/or for summary judgment on various claims. The district court first considered the plaintiffs' claim that the '027 Patent is invalid and unenforceable under § 102(b). The '027 Patent includes 36 claims. Claims 1 and 20 are independent. The other 34 claims are dependent. The independent claims read:

> 1. A process for browning precooked, whole muscle meat products comprising: coating a browning liquid pyrolysis product onto at least a portion of the surface of a precooked whole muscle meat product; and then

2. Section 2 of the Sherman Act defines the substantive violation of attempted monopolization. It states, in pertinent part: "Every person who shall . . . attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . ." 15 U.S.C. § 2. Private antitrust suits, including this one, technically proceed under Section 4 of the Clayton Act, which states, again in pertinent part: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in . . . district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a).

> exposing the coated surface to an energy source and selectively heating the coated surface of the whole muscle meat product at a temperature and for a time sufficient to develop a *golden-brown color* on the exposed surface, without substantial shrinking the precooked, whole muscle meat product.

'027 Patent, col. 8, ll. 4-14 (emphasis added).

> 20. A process for browning a precooked chicken breast or a turkey breast comprising: coating at least a portion of the surface of a precooked chicken breast or a precooked turkey breast with from about 0.05 to about 1.0 wt. %, based on the weight of the breast, of a browning liquid pyrolysis product obtained from hardwoods or sugars; and then selectively heating the coated surface of the breast in an environment having a temperature greater than about 60[deg] C. with energy provided by a circulating air oven, an impinging air oven, a laser light source, a medium wavelength energy infra red radiation source or a source of microwave radiation for a time sufficient to develop a *golden-brown color* on the coated surface, where the shrinkage of the precooked, whole muscle meat product is less than 4 wt. % based on the initial weight of the meat product.

'027 Patent, col. 9, ll. 17-33 (emphasis added). All of the remaining claims represent minor variations on these themes;

they vary heat source temperatures, core meat temperatures, amounts of shrinkage, browning liquids for pyrolysis, amounts of browning product, masking/flavoring agents, and energy sources.

Though ConAgra, in its brief opposing the motion for summary judgment, stressed the importance of having the district court construe all disputed claim limitations, it failed either to identify disputed claim terms or to submit specific interpretations of claim terms. Instead, ConAgra countered the plaintiffs' interpretation of the claim language with little other than a sweeping objection. The sole claim term in the '027 Patent that ConAgra disputed explicitly was "golden brown." Nevertheless, ConAgra argues on appeal that "claim construction could not be properly addressed without a separate hearing, given stringent page limitations. . . ."

The district court provided a formal construction for only the single term that ConAgra had actually disputed: "golden brown." ConAgra contends (and the plaintiffs do not dispute) that "[t]he 'golden-brown' limitation is obviously the heart of the '027 patent." The heart of the dispute over this term both below and on appeal, in turn, is whether or not the proper construction of "golden brown" flows from the term's plain meaning. The plaintiffs argued that it does. ConAgra, on the other hand, noted that the patent's five illustrative examples all included Hunter-Lab Color Meter measurements to describe color, asserted that construction according to plain meaning was therefore misplaced, and proposed a more technical definition gleaned from the examples.

Appendix A

The district court first reviewed the intrinsic evidence to determine that "the '027 patentee did not act as his own 'lexicographer' and failed to specifically define the term 'golden brown.' Thus, the Court views the term 'golden brown' with its plain meaning to one of skill in the art." Having failed to find a precise meaning in the intrinsic evidence, the district court turned to *Webster's Third New International Dictionary* 975 (1986) as a source of plain meaning, and formally construed "golden brown" as "a variable color averaging a strong brown that is yellower and slightly darker than gold brown, yellower and paler than average russet, and yellower and less strong than rust."

Given that claim construction, the district court next considered whether or not the Unitherm process and the patented process were the same process. The district court described the Unitherm process in detail, compared the voluminous documentary evidence describing the Unitherm process to the individual claim limitations claimed in the '027 Patent, reviewed what it characterized as undisputed evidence of prior sales and concluded that the '027 Patent "describes a process that was both on sale and in public use prior to May 11, 1997. Thus, the Court finds that the 1999 issuance of the '027 Patent was in error." The district court granted the plaintiffs' motion for summary judgment of invalidity and unenforceability for reasons of both prior use and prior sale under § 102(b), and consequently also granted Jennie-O's motion for summary judgment of noninfringement on the grounds that the '027 Patent is invalid and unenforceable.

Appendix A

C. Antitrust

Both plaintiffs also claimed that ConAgra's behavior in securing and enforcing the '027 Patent violated the antitrust laws. ConAgra moved to have Unitherm's claim dismissed for lack of antitrust standing, and Jennie-O's claim dismissed for lack of cognizable antitrust injury. The district court considered both of these motions at its summary judgment hearing, and determined that the plaintiffs had pled a viable claim, citing the Supreme Court's *Walker Process* decision:

> The enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present. In such event the treble damage provisions of § 4 of the Clayton Act would be available to an injured party.

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174 (1965). The district court then ruled that Unitherm, but not Jennie-O, had antitrust standing because first, as ConAgra's direct competitor for sales of browning/smoking processes, Unitherm was susceptible to the types of injuries that the antitrust laws are supposed to prevent, and second, ConAgra's threats to enforce its patents could cause those injuries. The district court dismissed Jennie-O's antitrust claim, but allowed Unitherm's claim to proceed to trial. Jennie-O has not appealed the dismissal.

Appendix A

At the end of the trial, the judge gave the jury various instructions concerning antitrust law. Of particular relevance to the issues raised on appeal, Jury Instruction number 11 defined the relevant market:

> Monopoly power must be found to exist within an economically meaningful market. Plaintiff asserts the relevant market consists of the browning process defined in the 027 patent. It is for you to determine if Plaintiff's definition is proper . . . The product market consists of processes that have reasonable interchangeability for the purposes for which they are developed when price, use, and qualities are considered....

Jury Instruction number 14 defined antitrust injury:

> Plaintiff must establish that it was injured as a result of Defendant's alleged attempt to gain a monopoly. . . . To establish injury, Plaintiff must prove that some damage flowed to Unitherm as a result of Defendant's alleged attempt to gain a monopoly. . . . It is enough if Plaintiff proves that the alleged attempt to gain a monopoly was a material cause of its injury.

The verdict form simply asked the jury to find for plaintiff Unitherm or for defendant ConAgra on the claim of attempted monopolization. The jury returned a verdict for Unitherm.

Appendix A

D. Other Claims and Damages

The district court proceedings led to final judgments on all claims. In addition to the antitrust claims, the court also allowed the plaintiffs to proceed to trial on their claims of tortious interference with prospective economic relationships and of actual or constructive fraud on Unitherm. The jury found that ConAgra was liable for tortious interference with prospective economic relationships, but not for fraud on Unitherm. Unitherm has not appealed the finding of no fraud.

The jury then awarded Unitherm $18 million in antitrust damages ($6 million, trebled), $2 million for ConAgra's tortious interference with their prospective economic advantage, and $2 million in punitive damages consequent to the tortious interference. Because the parties had stipulated that antitrust damages would subsume any damages assessed for tortious interference, the district court entered judgment for $18 million plus applicable interest. Because the antitrust laws also provide for reasonable attorneys fees, the court awarded the plaintiffs an additional $1,022,445. ConAgra timely appealed. We have jurisdiction to hear this appeal under 28 U.S.C. § 1295(a)(1).

DISCUSSION

A. Standard of Review

This appeal requires us to consider a number of different issues, and raises a number of questions concerning choice of law and standard of review. The district court granted the plaintiffs' summary judgment motion to find the '027 Patent

invalid and unenforceable under *both* the prior sale and prior use bars of § 102(b). We review all grants of summary judgment de novo, construing the facts in the light most favorable to the non-movant. *Liquid Dynamics Corp. v. Vaughan Co.*, 355 F.3d 1361, 1367 (Fed. Cir. 2004). Summary judgment is appropriate when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Prior use under § 102(b) includes any use of the claimed invention by a person other than the inventor who is under no limitation, restriction or obligation of secrecy to the inventor. *Netscape Communications Corp. v. Konrad*, 295 F.3d 1315, 1320 (Fed. Cir. 2002). Whether a patent is invalid due to a § 102(b) public use is a question of law based on underlying questions of fact. *Id.*

Our standards for reviewing a district court's finding of § 102(b) prior sale are similar: "In order to invalidate a patent under the on-sale bar of 35 U.S.C. § 102(b), an accused infringer must demonstrate by clear and convincing evidence that there was a definite sale or offer to sell more than one year before the application." *3M v. Chemque, Inc.*, 303 F.3d 1294, 1301 (Fed. Cir. 2002). "A determination that a product was placed on sale prior to the critical date is a conclusion of law based on underlying findings of fact. We review the ultimate determination de novo, and the underlying factual findings for clear error." *Linear Tech. Corp. v. Micrel, Inc.*, 275 F.3d 1040, 1047 (Fed. Cir. 2001).

Taken together, then, we must review the district court's summary judgment of invalidity and unenforceability by considering whether the facts, viewed in the light most favorable to ConAgra, nevertheless provide clear and convincing evidence of either (or both) prior use or prior sale. *See Linear Tech.*, 275 F.3d at 1047; *Liquid Dynamics*, 355 F.3d at 1367.

The district court also entered judgment against ConAgra after the jury found antitrust liability on Unitherm's *Walker Process* claim. We apply Federal Circuit law to all antitrust claims premised on the bringing of a patent infringement suit. *Nobelpharma AB v. Implant Innovations*, 141 F.3d 1059, 1068 (Fed. Cir. 1998) (en banc in relevant part). Whether a patentee's conduct in procuring or enforcing a patent is sufficient to strip its immunity from the antitrust laws is therefore a legal question that we review de novo under Federal Circuit law. *Id.* We apply the law of the regional circuit, in this case, the Tenth Circuit, to the elements of antitrust claims that are not unique to patent law. *Id.* These elements include but are not restricted to considerations of antitrust standing, market definition, antitrust injury, and damages. *Id.*

The Tenth Circuit recognizes antitrust standing, like all questions of standing to sue, as a question of law subject to de novo review. *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1253-1254 (10th Cir. 2003); *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 389 (10th Cir. 1985). Market definition and antitrust injury, on the other hand, are intensely factual determinations. *See e.g., Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482

(1992) ("The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-586 (1986) ("To survive petitioners' motion for summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury."). We must therefore review the evidence supporting the jury's necessary findings of a relevant antitrust market and of antitrust injury.

The Tenth Circuit limits the review of a jury verdict challenged on appeal to

> determining whether the record—viewed in the light most favorable to the prevailing party—contains substantial evidence to support the jury's decision. The jury has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in evidence, and reaching ultimate conclusions of fact.

Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955, 959 (10th Cir. 2002). In conducting our review for substantial evidence, we must "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

This same standard for reviewing a jury verdict applies to the jury's finding that ConAgra was liable for tortious interference with prospective economic advantage, a state law question. We review state law causes of action under the applicable state law for matters not committed to this court's exclusive jurisdiction, *University of West Virginia v. Vanvoorhies*, 278 F.3d 1288, 1296 (Fed. Cir. 2002), here the laws of Oklahoma. Oklahoma courts must affirm a jury verdict if there is any competent evidence reasonably tending to support it. *Computer Publ'ns., Inc. v. Welton*, 49 P.3d 732, 735 (Okla. 2002). This standard is unchanged even if the jury awards damages in amounts inconsistent with its finding of liability for tortious interference. *See Pine Island RV Resort, Inc. v. Resort Mgmt.*, 922 P.2d 609, 615 (Okla. 1996).

B. Claim Construction

Neither ConAgras generalized request that the district court conduct a *Markman* hearing nor its insistence on appeal that many complex issues lurk in various unnamed claim terms creates a disputed issue of material fact. As noted, the district court construed the only term that ConAgra disputed explicitly: "golden brown." Presumably, all other claim terms were undisputed because one of ordinary skill in the art would understand their plain meanings. In the context of jury instructions, we have doubted "that *Markman* requires the trial judge to instruct as to an undisputed 'claim construction' for every term, by simply parroting the words of the claim. . . ." *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1567 (Fed. Cir. 1997). We doubt even more strongly that a district court is obliged to construe undisputed claim terms prior to issuing a summary judgment of invalidity.

See also PSC Computer Prods., Inc. v. Foxconn Intl., Inc., 355 F.3d 1353, 1357 ("Although an infringement analysis typically begins with claim construction, the district court here did not construe the claims . . . because their meaning is not disputed."). ConAgras attempt to preserve its right to identify new "disputed" claims on appeal by requesting a generalized *Markman* hearing must therefore fail. *See United States Surgical*, 103 F.3d at 1567.

As to the content of the district court's construction, colors can indeed pose challenging construction tasks. At one level, they are commonly used terms with well-accepted plain definitions that rarely need construction. At another, they are precise scientific terms corresponding to very specific portions of the spectrum that require precise definitions and constructions. ConAgra argued below—and argues again on appeal—that the court should extract the range of Hunter-Lab Color Meter measurements from the '027 Patent's examples, and construe the term "golden brown" to include colors falling between "about" the low end and the high end of the illustrated ranges.

This dispute follows a classic pattern. The district court found no specific definition in the intrinsic evidence, and used a dictionary to find the term's plain meaning; ConAgra would have us extract a more technical construction by reading limitations into the claims from the examples. We discussed both the nature and the appropriate resolution of such disputes in *Texas Digital Systems v. Telegenix, Inc.*, 308 F.3d 1193, 1202-04 (Fed. Cir. 2002):

> It has been long recognized in our precedent and in the precedent of our predecessor court, the Court of Customs and Patent Appeals, that dictionaries, encyclopedias and treatises are particularly useful resources to assist the court in determining the ordinary and customary meanings of claim terms. . . .
>
> [But] the intrinsic record also must be examined in every case to determine whether the presumption of ordinary and customary meaning is rebutted. . . . [This] presumption . . . will be overcome where the patentee, acting as his or her own lexicographer, has *clearly set forth an explicit definition of the term different from its ordinary meaning*. Further, the presumption also will be rebutted if the inventor has disavowed or disclaimed scope of coverage, by using *words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope*. . . .

Id. (emphasis added).

The district court here did not consult a dictionary prior to searching the intrinsic evidence for a definition. To the contrary, the district court explicitly concluded that "the '027 patentee did not act as his own 'lexicographer' and failed to specifically define the term 'golden brown'" as a *precursor* to concluding that the proper construction of "golden brown" flowed from its plain meaning. Given that conclusion, the district court *then* consulted a dictionary to affix a legal definition at least somewhat more precise than an intuitive

understanding of a color. The district court's approach is proper. We have often noted that "[judges may] rely on dictionary definitions when construing claim terms, so long as the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1584 n.6 (Fed. Cir. 1996). Such is the case here; the dictionary definition that the district court adopted did not contradict any definition that one of ordinary skill in the art could ascertain from the intrinsic evidence in the record.

The district court's adoption of a plain meaning construction is therefore presumptively correct. To overcome that presumption, ConAgra must demonstrate that the intrinsic evidence provides both a clear and explicit disclaimer of the plain meaning and substitutes a more specific, technical construction of "golden brown." *See Tex. Digital*, 308 F.3d at 1203. ConAgra's suggestion that we glean numeric ranges from examples represents neither clear nor explicit disavowal of the common meaning. In fact, the examples are precisely what they purport to be: *examples* of Hunter-Lab Color Meter measurements falling within the commonly understood range of "golden brown." ConAgra does little other than "invite[ ] a violation of our precedent counseling against importing limitations into the claims." *Id.* at 1204.

We recently reversed a district courts claim construction for doing precisely as ConAgra urges—reading a limitation from an example into a claim term:

> Because the plain language of the claim was clear and uncontradicted by anything in the written description or the figures, the district court should not have relied upon the written description, the figures, or the prosecution history to add limitations to the claim. Under such circumstances, relying on the written description and prosecution history to reject the ordinary and customary meanings of the words themselves is impermissible.

Liquid Dynamics, 355 F.3d at 1368 (citations omitted). This admonition was hardly new. We have often stated that

> [w]hile . . . claims are to be interpreted in light of the specification and with a view to ascertaining the invention, it does not follow that limitations from the specification may be read into the claims. We recognize that there is sometimes a fine line between reading a claim in light of the specification, and reading a limitation into the claim from the specification.

Comark Communications v. Harris Corp., 156 F.3d 1182, 1187 (Fed. Cir. 1998) (citations omitted). *See also CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002) (explaining that a patentee cannot rebut the presumption of ordinary meaning "simply by pointing to the preferred embodiment or other structures or steps disclosed in the specification or prosecution history").

In short, the district court properly considered all intrinsic evidence before determining that none of it could overcome the presumption favoring plain meaning, and only then turned

to a dictionary to affix the plain meaning that one of ordinary skill in the art would assign to the color "golden brown." The district court therefore correctly construed the only disputed term according to its plain meaning as one of ordinary skill in the art would understand it, and we affirm its claim construction.

C. Invalidity and Unenforceability

ConAgra argues that the district court erred by ignoring numerous disputed facts that should have precluded its entry of summary judgment of invalidity and unenforceability. The district court, however, considered undisputed evidence that Unitherm had entered into the record, and concluded that Unitherm's enumeration of the parallels between the Unitherm process and the '027 Patents process succinctly demonstrated that the two processes are one and the same. This undisputed evidence combined contemporaneous correspondence, color photographs, witness testimony, and promotional videos. Together, it established numerous points of identity between the Unitherm process and the patented process.

The evidence showed that in 1993, Unitherm demonstrated and attempted to sell its process to Rocco Foods, Bilmar, Carolina Turkeys, *and ConAgra*. These demonstrations were performed in Elk Grove, Illinois and included: removing purge from and drying precooked, whole muscle turkey and ham products; the use of Maillose; quickly conveying products dipped in browning liquid pyrolysis products through Unitherm's RapidFlow circulating air oven over a range of temperatures (250-350C) to demonstrate any

shade of naturally baked, smoked, or roasted golden-brown desired with minimal shrinkage; applying the pyrolysis products at times and concentrations providing 0.05-1.0 wt. % and 0.15-0.3 wt. % pick-up; shrinkage of as little as 1% or less; as little as 1C or less increase in core temperature; mixtures of broth and Maillose or liquid smoke in broth concentrations of 5% and higher; and core temperatures remaining below 5C (41F).

These demonstrations alone proved Unitherm's prior public use of every limitation of independent Claims 1 and 20. The process of Claim 1 browned muscle meats by coating them with a pyrolysis product, and then exposing them to an energy source for a time and at a temperature sufficient for them to become golden brown, without substantial shrinkage. *See* '027 Patent, col. 8, ll. 4-14. The similar process of Claim 20 browned chicken or turkey breasts, but also specified that the pyrolysis product had to be obtained from hardwoods or sugars, and added specificity to the amount of pyrolysis product and the allowable amounts of shrinkage. *Id.* at col. 9, ll. 17-33. Maillose is a sugar derivative, and the 1993 demonstrations met both the pyrolysis usage and the allowable shrinkage specified in Claim 20.

Unitherm did not, however, cease demonstrating its process in public in 1993. Between 1994 and the critical date of May 11, 1997, Unitherm's demonstrations to *ConAgra*, Carolina Turkeys, Hudson Foods (now Willow Brook), Jennie-O, Foster Farms, Perdue, Plainville, and Wilson Foods involved (in various combinations): temperatures of 250F and higher; dip times of 10-70 seconds in 20-70% Maillose or liquid smoke solutions; measured liquid pickup amounts

of 0.05% and higher; the use of infrared energy for purge removal and drying; and the achievement of any shade or darkness of golden-brown desired. One of Unitherm's presentations to Perdue explained that "by altering dwell time or temperature, you dial in the degree of color you require," implying at least much of the variability captured in the various '027 Patent claims.

Unitherm also prepared promotional videos in 1993 and 1996. The 1993 video includes demonstrations of precooked, whole muscle turkey breasts and hams dipped in Maillose or liquid smoke and then conveyed through the RapidFlow oven. To broadly demonstrate the ability to produce any shade desired, the video shows product colors matching light oven-roasted, medium oven-roasted, Black Forest oven-roasted, and smoked ham and smoked, skinless turkey. The video notes that a spray station can be added for smoking, flavoring, or enhancing product browning. Unitherm distributed approximately 500 copies of this video throughout the industry.

The 1996 videos showed whole muscle ham logs in a tub of Maillose, conveyed through the RapidFlow oven for 7.5 minutes to provide an oven-roasted, golden-brown color. The videos also showed one and then six Maillose-dipped, precooked whole muscle turkey breasts being delivered through the oven to produce a golden-brown color. Unitherm distributed approximately 500 copies of these videos in 1996, with no obligation of secrecy. Taken together, Unitherm's overwhelming evidence of prior public use captures every limitation in every one of the '027 Patent's claims.

Unitherm also submitted evidence that, prior to the critical date of May 11, 1997, it had sold both its RapidFlow ovens and the process that it had been demonstrating. In addition to its 1995 sale to Jennie-O, Unitherm proved sales to Thorn Apple in 1995 and to Hudson Foods in 1996. Unitherm further proved that Plantation ordered a Unitherm system on February 7, 1997 and that Foster Farms ordered a system and made its first payment by May 9, 1997. Jennie-O's Robert Wood testified that the process that Jennie-O purchased from Unitherm "was able to prepare the surface, apply liquid smoke and set liquid smoke." The demonstrations to ConAgra alone suggest that ConAgra was aware of the Unitherm process for at least several years prior to the critical date.

ConAgra does not dispute this evidence, but rather insists that material factual disputes about the identity of its patented process and the Unitherm process remain—and that therefore the district court should not have entered summary judgment of either prior use or prior sale. Even on appeal, however, ConAgra appears unable to point to any specific disputed material fact. Broadly speaking, ConAgra's briefs to this court either mischaracterize Unitherm's general desire to protect its trade secrets as evidence that the Unitherm process was a trade secret or attempt to demonstrate that not every use of Unitherm's ovens was consistent with the patented process.

First, ConAgra argues that the district courts reliance on Unitherm's promotional videos was misplaced because Unitherm itself admitted that the videos do not meet *all* of the patent claims. ConAgra cites as support a Unitherm document showing the correspondence between its videos

and the '027 Patent's claim terms. In this document, Unitherm asserts that the processes demonstrated in its video meets all limitations of Claims 1-7, 10-12, 15-23, 26, 29-36, and renders Claims 8, 9, 13, 24-27 obvious under 103(a). This purported "admission" therefore fails to account for only dependent claims 14 and 28. These two claims differ from others only in requiring a slightly more restricted temperature range. This argument does not establish a material factual dispute.

Second, ConAgra asserts that Unitherm gave conflicting testimony concerning whether or not its process remained a trade secret in 1998. In support, ConAgra cites Unitherm's admission that the Unitherm process was not a secret, while nevertheless maintaining nondisclosure agreements with various customers and competitors and expressing a general desire to keep its trade secrets secret. This argument does not establish a material factual dispute.

Third, ConAgra contrasted the district court's statement that Unitherm's President, David Howard, first disclosed the Unitherm process to ConAgra in 1993 with a letter from Howard stating that Unitherm first revealed the process to ConAgra in 1995. While this discrepancy could have been significant if the critical date had been in 1994, apparent confusion between two equally invalidating dates does not qualify as *material*. This argument does not establish a material factual dispute.

Fourth, ConAgra turns to one of its own witnesses, Dr. Syed Hussain. ConAgra suggests that the district court placed great weight on a factually sparse data sheet describing

Unitherm's 1993 demonstrations to Dr. Hussain. While these data sheets are, in fact, less than clear, so is the district court's reliance on them. ConAgra has not pointed to a specific place in which the district court found these sheets particularly significant. ConAgra also cites to Hussain's testimony that he could not remember whether or not the demonstrated Unitherm process produced a "golden brown" finish. It is unclear why Hussain's inability to recall a color should create a dispute. This argument does not establish a material factual dispute.

Fifth, ConAgra asserts that the district court ignored triable issues of fact by pointing to experiments that do not show that the Unitherm process met the limitations of the '027 Patent. While this argument is true, there is no particular basis for its conclusion that these experiments *did not* meet the limitations. This argument does not establish a material factual dispute.

Sixth, ConAgra cites from the testimony of a Hudson executive. Unitherm's sale of both product and process to Hudson was among the district court's key undisputed prior sales. ConAgra argues that the witness lacked a personal knowledge of the details of the process. ConAgra also points to some handwritten documents that are difficult to read and whose significance is unclear. ConAgra does not assert that they establish a material dispute, but rather that they fail to provide solid evidence. Again, even if true, this argument does not establish a material factual dispute.

In short, Unitherm's undisputed evidence proved that its own process included each and every limitation of every

claim of the '027 Patent. ConAgra's evidence failed to establish even a single material factual dispute. The district court correctly determined that the undisputed facts—Unitherm's various demonstrations to ConAgra and its sales to Hudson, Jennie-O and other suppliers—constituted clear and convincing evidence of *both* prior use and prior sale. The claim language in the '027 Patent was straightforward, a detailed construction was unnecessary, and the district court correctly granted summary judgment. *See 3M*, 303 F.3d at 1301. The '027 Patent is invalid and unenforceable by reason of prior use and sale under 102(b).

D. Antitrust

(i) Elements

It is important to outline the elements of a *Walker Process* claim before considering ConAgra's appeal of the jury verdict. Unitherm alleged that ConAgra attempted to enforce the '027 Patent, which it obtained by defrauding the PTO. If true, ConAgra would lose its exemption from the antitrust laws. *Walker Process*, 382 U.S. at 177. On the same basis, ConAgra's good faith attempts to behave in accordance with the patent laws would furnish a complete defense, and ConAgra would retain its antitrust exemption; ConAgra would have done little but attempt to enforce a patent right which it reasonably believed itself to possess. *Id.*

The elimination of ConAgra's antitrust immunity would mark only the beginning of the antitrust inquiry, not its endpoint.

> To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition.

Id. It may be that the patented process "does not comprise a relevant market. There may be effective substitutes . . . which do not infringe the patent. This is a matter of proof, as is the amount of damages . . ." *Id.* at 178.

In order to prevail on its *Walker Process* claim, Unitherm must therefore establish: that ConAgra attempted to enforce the '027 Patent; that the '027 Patent issued because ConAgra defrauded the PTO; that ConAgra's attempted enforcement threatened to lessen competition in a relevant antitrust market; that Unitherm suffered antitrust damages; and that all other elements of attempted monopolization are met. *Id.* These requirements frame our antitrust inquiry.

(ii) Choice of Law

ConAgra appeals the jury's antitrust verdict, claiming that Unitherm did not produce evidence sufficient to support findings of a relevant antitrust market, a dangerous probability of success, antitrust injury, or standing—all critical elements of a § 2 attempted monopolization claim. *See generally Verizon Communications, Inc. v. Law Offices*

of Curtis v. Trinko, LLP, 540 U.S. 398, 124 S.Ct. 872 (2004). Unitherm counters that it provided the jury with "substantial evidence," but does not point to any.

Both parties cite Tenth Circuit law to guide our analysis. This pointer is only partially correct; Federal Circuit law governs all antitrust claims premised on the abuse of a patent right. *Nobelpharma*, 141 F.3d at 1067-68. We first announced this rule of Federal Circuit antitrust law as a unanimous en banc court in 1998. *Id.* at 1067 n.5. We explained that in all future antitrust cases, we would apply the same basic choice of law rule that we apply to all other matters—and for precisely the same reason. *Id.* at 1067-68. Because this court is in the best position to impose uniformity on the patent laws, we now decide issues raised in an antitrust claim that are unique to the patent law under Federal Circuit law, and all other issues under the law of the relevant regional circuit—in this case, the Tenth Circuit. *Id.* at 1067-68. The parties' confusion about the choice of law, however, suggests that we need to clarify both the reasons that we introduced Federal Circuit antitrust law and the relationship between our law and that of the regional circuits.[3]

3. The Supreme Court has ruled that the regional circuits retain appellate jurisdiction over cases in which the complaint does not allege a claim arising under federal patent law, but the answer does contain a patent-law counterclaim. *Holmes Group v. Vornado Air Circulation Sys.*, 535 U.S. 826, 827 (2002). As a result, antitrust claims met with counterclaims of infringement may not come before this court. If the resolution of the dispute rests, in part, upon a determination of whether or not a patentee's behavior stripped it of its antitrust exemption, the appellate court hearing the matter will have to decide whether to apply Federal Circuit law or risk disturbing

(Cont'd)

The fundamental question of Federal Circuit antitrust law is whether or when a patentee's behavior in either procuring or enforcing a patent can give rise to antitrust liability. *Id.* As a general rule, behavior conforming to the patent laws oriented towards procuring or enforcing a patent enjoys immunity from the antitrust laws. *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964) ("The patent laws which give a . . . monopoly on making, using, or selling the invention are in pari materia with the antitrust laws and modify them pro tanto.").

But this immunity is hardly absolute. Nearly forty years ago, the Supreme Court recognized that an inventor who obtains a patent by defrauding the patent office deserves no immunity. *Walker Process*, 382 U.S. at 174. This recognition fell well within a long-established understanding of the limits of patent protection, as reflected in the Supreme Court's much earlier announcement that patentees who attempt to leverage their appropriately obtained patents beyond the claimed product lose the right to enforce their patents. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 513 (1917). The Supreme Court subsequently refined this notion of patent misuse and its consequent penalties, so that it "is now, of course, familiar law that the courts will not aid a

(Cont'd)

"Congress's goal of ensuring patent-law uniformity," *id.*, by applying its own law The choice of law rule that we announced in *Nobelpharma*, 141 F.3d at 1067-68, is a sensible approach to preserving the uniformity of the patent law without regard to the appellate forum: Federal Circuit law determines whether or not the patentee enjoys antitrust immunity under the patent laws, while regional circuit law determines the other elements of the antitrust claim.

patent owner who has misused his patents to recover any of their emoluments accruing during the period of misuse or thereafter until the effects of such misuse have been dissipated, or 'purged' as the conventional saying goes." *United States Gypsum Co. v. Nat'l Gypsum Co.*, 352 U.S. 457, 465 (1957). More broadly, "[t]he Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next." *Eastman Kodak*, 504 U.S. at 479 n.29.

The Supreme Court itself noted the policy consistency between penalizing patent misuse and stripping antitrust immunity from patentees who defraud the PTO. *Walker Process*, 382 U.S. at 176. As a well established matter of law, then, patentees acting under the color of their patents may nevertheless be liable if they engage in any one of a number of improper activities. *See, e.g., Eastman Kodak*, 504 U.S. at 479 n.29; *CSU, L.L.C. v. Xerox Corp.*, 203 F.3d 1322, 1326 (Fed. Cir. 2000) ("The patentee's right to exclude, however, is not without limit."); *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1355 (Fed. Cir. 1999) (holding that a patentee's bad faith allegations that a competitor is infringing a valid patent may strip the patentee of the liability exemptions that the patent law generally provides patentees). In short, the policy rationale behind stripping selected patentees of their antitrust immunity is straightforward.

The gist of a *Walker Process* claim

> is that since [the patentee] obtained its patent by fraud it cannot enjoy the limited exception to the

> prohibitions of § 2 of the Sherman Act, but must answer under that section and § 4 of the Clayton Act in treble damages to those injured by any monopolistic action taken under the fraudulent patent claim. Nor can the interest in protecting patentees from "innumerable vexatious suits" be used to frustrate the assertion of rights conferred by the antitrust laws. It must be remembered that we deal only with a special class of patents, i.e., those procured by intentional fraud.

Walker Process, 382 U.S. at 176. *Walker Process* claims therefore relate to a single type of behavior capable of stripping a patentee's patent-law immunity and thereby exposing the patentee to liability under other laws. Though we cannot enumerate the full range of activities capable of effecting such a loss of immunity, the determination of *which* actions can cause a patentee or a patent applicant to lose the general protection of the patent law and to risk liability for damages is clearly an issue unique to the patent law—and therefore inappropriate for resolution under the potentially varying interpretations of the regional circuits. *Nobelpharma*, 141 F.3d at 1067-68.

As a result, Federal Circuit antitrust law centers on a single critical question: What behavior by the patentee in procuring or in enforcing a patent can strip the patentee of antitrust immunity? When the courts consider a patentee's behavior under Federal Circuit law and determine that it involved nothing more than an appropriate attempt to procure a patent and an appropriate attempt to enforce a legitimately obtained patent, the antitrust inquiry is over with respect to

the behavior at issue.[4] When, on the other hand, the courts consider a patentee's behavior under Federal Circuit law and determine that it involved either an inappropriate attempt to procure a patent or an inappropriate attempt to enforce a patent, the remainder of the antitrust inquiry must proceed under the law of the regional circuit. *Id.* at 1068.

(iii) Patent Enforcement

The present matter implicates ConAgra's behavior in *obtaining* the '027 Patent. Unitherm's allegations differ from standard *Walker Process* claims in that Unitherm raised them as ancillary to its Declaratory Judgment Action, rather than as a counterclaim to an allegation of patent infringement. *See id.* at 1068 ("An antitrust claim premised on stripping a patentee of its immunity from the antitrust laws is typically raised as a counterclaim by a defendant in a patent infringement suit."). The logic governing *Walker Process* claims, however, suggests that we should treat claims brought ancillary to Declaratory Judgment Actions precisely as we treat counterclaims, *see Walker Process*, 382 U.S. at 176-77,

4. The patent law's pro tanto modification of the antitrust law, *Simpson*, 377 U.S. at 24, extends to behavior, not to either patents or patentees. It is entirely possible for a patentee to retain its antitrust exemption with respect to some behavior while being stripped of the exemption with respect to other behavior. "[B]eyond the limited monopoly which is granted, the arrangements by which the patent is utilized are subject to the general law. . . . [T]he possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly." *United States v. Singer Mfg. Co.*, 374 U.S. 174, 196-197 (1963). The Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage." *Id.*

though this atypical posture does raise an additional question. Strictly speaking, a *Walker Process* claim is premised upon "the *enforcement* of a patent procured by fraud on the Patent Office." *Id.* at 174. A plaintiff may bring a Declaratory Judgment Action of patent invalidity, however, even in the absence of overt enforcement actions.

> When the defendant's conduct, including its statements, falls short of an express charge, one must consider the "totality of the circumstances" in determining whether that conduct meets the first prong of the test [for jurisdiction to hear a Declaratory Judgment Action]. If the circumstances warrant, a reasonable apprehension may be found in the absence of any communication from defendant to plaintiff. If, on the other hand, defendant has done nothing but obtain a patent, there can be no basis for the required apprehension, a rule that protects quiescent patent owners against unwarranted litigation.

Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 736 (Fed. Cir. 1988). We therefore hold that, as a matter of Federal Circuit antitrust law, the standards that we have developed for determining jurisdiction in a Declaratory Judgment Action of patent invalidity also define the minimum level of "enforcement" necessary to expose the patentee to a *Walker Process* claim for attempted monopolization.

This holding adopts the reasoning that we once applied prior to our announcement of Federal Circuit antitrust law, at a time that we evaluated all antitrust issues under the law

of the regional circuits,[5] in affirming a district court's dismissal of both a Declaratory Judgment Action for invalidity and a *Walker Process* claim: "It is enough to simply point out that the same facts that compel the conclusion that [the plaintiff] failed to establish declaratory judgment jurisdiction for the district court also compel the conclusion that no reasonable fact finder could find that [the defendant] has acted to enforce [its] patent." *Cygnus Therapeutics Sys. v. ALZA Corp.*, 92 F.3d 1153, 1162 (Fed. Cir. 1996). In other words, if the patentee has done nothing but obtain a patent in a manner that the plaintiff believes is fraudulent, the courts lack jurisdiction to entertain either a Declaratory Judgment Action or a *Walker Process* claim. *See Gen-Probe Inc. v. Vysis, Inc.*, 359 F.3d 1376, 1379 (Fed. Cir. 2004).

(iv) Fraud on the PTO

Unitherm's *Walker Process* claim alleges that ConAgra attempted to enforce a patent that it obtained only because it defrauded the PTO. We have consistently explained that *Walker Process* fraud is a variant of common law fraud, *see, e.g., In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 807 (Fed. Cir. 2000); *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1364 (Fed. Cir. 1998); *Nobelpharma*, 141 F.3d at 1369-71, and that the elements of common law fraud include:

> (1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as

5. We decided *Cygnus Therapeutics Sys. v. ALZA Corp.*, 92 F.3d 1153, 1162 (Fed. Cir. 1996) as a matter of Ninth Circuit law.

> to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation.

Spalding, 203 F.3d at 807 (citations omitted). Our determination of whether or not to strip ConAgra of its antitrust immunity therefore requires us to apply the facts of this case to each of these elements:

The first element of the alleged fraud was ConAgra's relevant material representation to the PTO that Prem Singh invented the claimed process, and that he neither used it in public nor offered it for sale prior to May 11, 1997. Though the plaintiffs' have provided no direct evidence proving that either Singh or ConAgra actually made this material representation, we may nevertheless presume that Singh, the named inventor and applicant, must have reviewed the specification and signed the required declaration before the application was filed.[6] *Glaxo Inc. v. Novopharm Ltd.*, 52 F.3d 1043, 1051 (Fed. Cir. 1995). Any other conclusion would

6. Under normal circumstances, we would expect the prosecution history to play a critical role in proving that a patentee defrauded the PTO. The prosecution history is, after all, the record of all correspondence between the patentee and the PTO, and therefore provides the best *direct* evidence of every representation that the patentee made. In the present matter, neither party placed the prosecution history in the record. Because of this omission, the plaintiffs must build an entirely circumstantial case using inferences and presumptions. The presumption of validity implies that the

(Cont'd)

> completely ignore[ ] the *requirement* that patents are applied for "in the name of the actual inventor or inventors" according to 37 C.F.R. § 1.41(a) (1983). The inventor(s) must submit an oath or declaration attesting that they have "reviewed and understand[ ] the contents of the specification" and believe "the named inventor or inventors to be the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought." 37 C.F.R. § 1.63; see also 37 C.F.R. § 1.51(a)(2).

Id. (emphasis in the original). This presumption, of course, would hold only Singh himself liable for the material misrepresentation. It is undisputed, however, that Singh filed the patent application as a ConAgra employee and assigned the patent to ConAgra. Nor is there any dispute that both Singh and numerous ConAgra colleagues and supervisors knew of Howard's demonstrations of the Unitherm process to ConAgra.

According to the Restatement (Second) of Agency § 257, "[a] principal is subject to liability for loss caused to another by the other's reliance upon a tortious representation of a servant or other agent, if the representation is: (a) authorized;

(Cont'd)
Examiner believed the patent to be valid when it issued. *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1359 (Fed. Cir. 1984). Regulations required the named inventor, Singh, to sign an oath attesting to his inventorship. 37 C.F.R. § 1.63. We may therefore presume that Singh represented to the PTO that he was the process' original inventor.

(b) apparently authorized; or (c) within the power of the agent to make for the principal." Comment (a) explains that "the principal's liabilities do not depend upon the theory of respondeat superior but upon the reason underlying liability upon authorized or apparently authorized contracts." *Id.* The undisputed facts surrounding Singh's patent application demonstrate that he filed it as an employee of ConAgra, to whom he assigned it. These same facts therefore establish ConAgra's potential liability for any damages arising from Singh's misstatements.

The second element of the alleged fraud, the falsity of ConAgra's material representation to the PTO, is evident from the same facts that led the district court to conclude, and this court to affirm, that David Howard invented the process claimed by the '027 Patent no later than 1993, and both used it and sold it numerous times prior to the critical date—thereby rendering the '027 Patent invalid under § 102(b).

The third element of the alleged fraud, ConAgra's intent to deceive, is the most difficult to prove. Nevertheless, clear and convincing circumstantial evidence establishes that, at the very least, ConAgra's behavior exhibited "a state of mind so reckless as to the consequences that it is held to be the equivalent of intent." *Spalding*, 203 F.3d at 807. Such circumstantial evidence is sufficient to establish the intent element of common-law fraud. *Id.*

> Intent need not be proven by direct evidence; it is most often proven by a showing of acts, the natural consequences of which are presumably intended

by the actor. Generally, intent must be inferred from the facts and circumstances surrounding the applicant's conduct. The drawing of inferences, particularly in respect of an intent-implicating question . . . is peculiarly within the province of the fact finder that observed the witnesses. . . . However, given the ease with which a relatively routine act of patent prosecution can be portrayed as intended to mislead or deceive, clear and convincing evidence of conduct sufficient to support an inference of culpable intent is required. . . . While intent to deceive the PTO may be found as a matter of inference from circumstantial evidence, circumstantial evidence cannot indicate merely gross negligence. . . . [C]lear and convincing evidence must prove that an applicant had the specific intent to accomplish an act that the applicant ought not to have performed, viz., misleading or deceiving the PTO.

Molins PLC v. Textron, 48 F.3d 1172, 1180-1181 (Fed. Cir. 1995).

Unitherm's burden at trial was therefore to present evidence that a reasonable jury could view as clear and convincing proof that ConAgra intended to defraud the PTO. *See id.* ConAgra argues on appeal that Unitherm failed to meet that burden. We must therefore review the sufficiency of Unitherm's evidence, while assuming that the jury disbelieved all evidence favorable to ConAgra. *See Reeves*, 530 U.S. at 151.

Unitherm proffered ample evidence that its personnel performed several browning demonstrations for ConAgra between September 1993 and January 1994. The key ConAgra representative at these demonstrations was Syed Hussein, ConAgra's product development manager and a co-worker of the named inventor, Prem Singh. At trial, on direct examination, Hussein testified that "to the best of his recollection," when he presented the product to a group of his co-workers, Singh was part of the group. Unitherm's David Howard also testified that Singh had attended a marketing seminar at which Howard personally spoke for about ninety minutes, and other Unitherm personnel provided a video demonstration of the product. This evidence demonstrates that ConAgra knew of prior uses of the process.

Unitherm also proffered ample evidence of a second round of demonstrations for ConAgra between 1995 and 1997. At his deposition, ConAgra's Arnold Mikelberg testified that shortly after becoming president of Armour Swift-Eckrich in mid-1995, he invited David Howard to demonstrate his process, and that this demonstration led to further testing at ConAgra. ConAgra and Unitherm followed these tests with further discussions. On April 25, 1996, for example, Unitherm directed a fax to Singh containing drawings and schematics for a browning line. Unitherm proffered numerous other documents indicating that, at the very least, Unitherm directed detailed plans to Singh. On April 21, 1997, Howard wrote to ConAgra's David Liddle, noting that: "I have sold the process to four competitors. How do I get [you] to move forward?" This letter indicates that ConAgra knew of prior sales, as well as the prior demonstrations.

Unitherm submitted additional documents and testimony to bolster its arguments even further. ConAgra questioned the implications of some of the documents and the accuracy of some of the witnesses' memories. ConAgra also denied that its patented process was the same as the Unitherm process, and insisted that it was impossible to know what "golden brown" meant without formal measurements. Such responses, however, cannot save ConAgra from the limited factual review that we apply to sufficiency of evidence arguments about jury findings. *Reeves*, 530 U.S. at 151.

The jury was entitled to find *all* of Unitherm's evidence credible and to disbelieve *every* assertion that ConAgra made about a disputed fact. *Id.* Viewed in this light, it is reasonable for the jury to have concluded that Singh was fully aware that his "invention" was precisely the Unitherm process that David Howard had been trying to sell to ConAgra since 1993. The jury could also have concluded reasonably that Singh intended to deceive the PTO by claiming that he was "the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought," 37 C.F.R. § 1.63, when he knew that he was not.

The best evidence of the fourth element of the alleged fraud, the PTO's justifiable reliance on Singh's deception that induced PTO action, is that the PTO issued the patent. The statutory pronouncement that "a patent shall be presumed valid," 35 U.S.C. § 282 implies that patent examiners are presumed to issue only valid patents. *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1359 (Fed. Cir. 1984). Singh's misrepresentation of his own inventorship, and his omission of the evidence that ConAgra possessed

about the Unitherm process and about Unitherm's demonstrations and sales of that process, defrauded the PTO. *See Nobelpharma*, 141 F.3d at 1070. Had the PTO not relied on this fraud, the Examiner would have reached the same conclusion as did the district court and this court—that David Howard had invented the claimed process no later than 1993, and that no valid patent could issue from Singh's application.

The fifth element of the alleged fraud, injury to the PTO and to the public that it serves, arises as a matter of course whenever the other four elements are met, because

> [a] patent by its very nature is affected with a public interest. The far reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. Where fraud is committed, injury to the public through a weakening of the Patent System is manifest.

Norton v. Curtiss, 57 C.C.P.A. 1384, 1406 (1970) (citations omitted).

Taken together, then, (1) ConAgra is liable for Singh's material representation to the PTO that he invented the claimed process, which had been neither used nor sold more than a year prior to filing his patent application; (2) David Howard invented the claimed process and both used or sold it before the critical date; (3) ConAgra intended to deceive

the PTO by filing a patent application misrepresenting the material facts of inventorship; (4) The PTO relied upon ConAgra's misrepresentations to issue the '027 Patent; and (5) ConAgra's fraud injured the public through a weakening of the patent system. *Norton*, 57 C.C.P.A. at 1406. ConAgra's knowing and willful misrepresentation therefore constituted fraud on the PTO. *See Molins*, 48 F.3d at 1180-1181; *Spalding*, 203 F.3d at 807.

Unitherm has thus met the first and most basic requirement for bringing a *Walker Process* claim. Unitherm has shown that, as a matter of Federal Circuit antitrust law, ConAgra attempted to enforce a patent that it obtained through fraud on the PTO. ConAgra is therefore stripped of its antitrust immunity and susceptible to antitrust liability—provided that Unitherm can show that ConAgra's behavior met all other necessary elements of a § 2 claim subject to Tenth Circuit law.

(v) Standing

Federal Circuit antitrust law is directed, almost entirely, to a single question: "[W]hether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws." *Nobelpharma*, 141 F.3d at 1068. Once we have determined, as we have here, that a patentee deserves no antitrust immunity, our inquiry shifts to apply the substantive antitrust laws of the regional circuit. *Id.*

ConAgra challenges on appeal, as it did below, Unitherm's standing to bring its antitrust claim. It is widely

recognized that an antitrust plaintiff must allege more than simply that the defendant's wrongful behavior directly damaged the plaintiff's business, but also that the accused behavior stifled competition. *See, e.g., Ill. Brick Co. v. Illinois*, 431 U.S. 720, 724 (1977); *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 4 (1st Cir. 2004); *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979). The line between antitrust claims and ordinary business tort and contract claims is not always clear. Some behavior, (according to Unitherm, ConAgra's behavior), can give rise to both sets of claims; the classic example is a near monopolist who burns down the plant of his only competitor. *See E. Food*, 357 F.3d at 4.

For Unitherm to possess antitrust standing under Tenth Circuit law, it must demonstrate that ConAgra's behavior caused it to suffer an "antitrust injury." *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1252 (10th Cir. 2003).

> An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. . . . Factors to consider in evaluating antitrust standing include: (1) the causal connection between the alleged antitrust violation and the harm; (2) improper motive or intent of defendants; (3) whether the claimed injury is one sought to be redressed by antitrust damages; (4) the directness between the injury and the market restraint resulting from the alleged violation; (5) the speculative nature of the

> damages claimed; and (6) the risk of duplicative recoveries or complex damage apportionment.

Sports Racing Servs. v. Sports Car Club of Am., 131 F.3d 874, 882 (10th Cir. 1997) (internal citations and quotations omitted). *See also Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 882 (Fed. Cir. 1985).

Unitherm's allegations met all six of the Tenth Circuit's enumerated factors: (1) ConAgra's attempts to block the "Unitherm process" by enforcing the '027 Patent caused Unitherm to lose prospective sales; (2) ConAgra's fraud of the PTO demonstrated improper intent; (3) Antitrust laws provide remedies for competition reduced in a relevant antitrust market, which Unitherm pled; (4) Enforcement of a patent right directly reduces competition; (5) A lost-sales analysis could, in theory, measure the harm; and (6) Damage calculations should be neither unusually complex nor duplicative. The district court was therefore correct in ruling that Unitherm had antitrust standing and in allowing its action against ConAgra to proceed.

(vi) Market Definition

Despite possessing antitrust standing, however, Unitherm never presented any evidence that could possibly support critical factual elements of its claim. In particular, Unitherm failed to present any facts that could allow a reasonable jury to accept either its proposed market definition or its demonstration of antitrust injury. "It is well settled that defining the relevant market is an issue of fact" for the jury to determine. *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796

F.2d 1216, 1220 (10th Cir. 1986). ConAgra challenges the jury's factual findings. We must therefore review Unitherm's proffered evidence, once again disregarding all disputed evidence favorable to ConAgra, *Reeves*, 530 U.S. at 151, to determine whether a reasonable jury could have accepted Unitherm's definition of the relevant market.

Under Tenth Circuit law, "[c]laims of attempted monopolization under § 2 of the Sherman Act require four elements of proof: (1) a relevant geographic and product market; (2) specific intent to monopolize the market; (3) anticompetitive conduct in furtherance of the attempt; and (4) a dangerous probability that the firm will succeed in the attempt." *United States v. AMR Corp.*, 335 F.3d 1109, 1113 (10th Cir. 2003). A relevant product market, in turn, is

> composed of products that have reasonable interchangeability for the purposes for which they are produced . . . [B]ecause the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the relevant market rests on a determination of available substitutes . . . To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume. . . .

Telecor Communications., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1130-1131 (10th Cir. 2002).

Market definition therefore hinges on economic evidence. If Unitherm provided economic evidence sufficient to convince a reasonable jury of its proposed market definition and to demonstrate antitrust injury, ConAgra's appeal must fail; the district court would have been correct in allowing the jury to consider Unitherm's antitrust claim—and in accepting their conclusion. But if, on the other hand, Unitherm provided economic evidence insufficient to convince any reasonable jury that ConAgra's enforcement of the '027 Patent harmed a relevant antitrust market, the antitrust claims should never have reached the jury. We therefore review the sufficiency of the economic evidence that Unitherm proffered in support of its antitrust claim.

Unitherm's brief to this court asserts that its expert, Dr. Mangum, testified at length on the lack of substitutes for the patented process. Mangum's testimony, or at least the relevant excerpts in the appellate record, cannot sustain Unitherm's definition of a relevant market. Mangum defined the market as: "the process for browning precooked whole muscle products by coating with a browning agent and applying sufficient heat to brown the product without substantial shrinkage." He relied on his understanding of the court's summary judgment ruling to assume that the patented process and the Unitherm process were the same process—and therefore the only one included in his market definition. Consequently, he defined the scope of the '027 Patent as coterminous with a relevant antitrust market.

Mangum identified seven technical benefits that the patented process provided, and explained that no other process could provide all seven of these benefits. This unique

combination of benefits led Mangum to conclude that no substitutes exist for the patented process (a.k.a. the Unitherm process), and therefore that it defined a relevant antitrust market. He also, however, concluded that pre-cooked turkeys prepared using the patented process competed with pre-cooked turkeys not prepared by the patented process at the retail level, but somehow not at the wholesale level. He never explained this seeming anomaly.

Mangum did not explain the relationship between technological substitution and economic substitution. Nothing in the record addresses whether potential customers of the patented process faced with a price increase would shift to other processes offering different combinations of benefits. *Id.* This determination, however, lies at the heart of market definition in antitrust analysis. "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose cross-elasticities of demand are small." *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 613, n.31 (1953). Not only is economic substitutability critical to market definition, but it is improper to interpret "the Sherman Act to require that products be fungible to be considered in the relevant market." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956). *See generally* U.S. Department of Justice, Merger Guidelines (1982), ch. 1.1 (describing the agencies' approach to product market definition in a merger analysis and the critical rule of *economic* substitutability).

Mangum's testimony specifically described the market in terms of technological substitutability, not economic substitutability. The scant economic evidence in the record suggests strongly that his market definition is incorrect. ConAgra's inability to attract any licensees is indicative of a lack of pricing power—*the* single most important element in defining a relevant antitrust market. "Market power is the power to force a purchaser to do something that he would not do in a competitive market. It has been defined as the ability of a single seller to raise price and restrict output." *Eastman Kodak*, 504 U.S. at 464 (citations omitted). Mangum's reliance upon technological, rather than economic, substitution is therefore a fatal flaw in establishing his proposed market definition; it left him with no economic content to sustain his relevant market.

Furthermore, on cross-examination, Mangum testified that he was unaware of anyone who had ever sold the process that defined his relevant market—other than tied to the sale of an oven. Mangum explicitly testified that, to the best of his knowledge, there has never been a transaction in his proposed relevant market. He steadfastly refused to clarify the relationship among the market for the specific browning process that he had identified, the market for browning processes generally, and the market for ovens that enabled their owners to use either the specific browning process or browning processes more generally. He testified to a lack of knowledge as to whether or not the bundling of the identified process with an oven bore any relation to the prices charged for enabling ovens. Mangum's testimony cannot sustain the narrow market that he defined and that Unitherm pleads as a relevant antitrust market.

Beyond that initial omission, Mangum's testimony on other points is short on economic content. His assessment of ConAgra's "dangerous probability of success," another critical component of an attempted monopolization claim, *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993), essentially rests upon a tautology: Because he defined the relevant market as coterminous with the '027 Patent, any attempt to enforce the patent would qualify as an attempt with a dangerous probability of succeeding. He then pointed to ConAgra's counterclaim against Jennie-O and ConAgra's letters as evidence of attempted patent enforcement.

Finally, when asked about antitrust injury, Mangum pointed to the analysis of Dr. Kinrich, Unitherm's damages expert. According to Mangum, Kinrich's ability to measure damages proves that Unitherm suffered antitrust injury. Kinrich, however, "was asked to assume that the jury finds in favor of Unitherm and finds against Swift-Eckrich and compute what the damages were or would have been to Unitherm if liability is found." Kinrich's testimony gave no indication that he ever tried to differentiate harm attributable to ConAgra's *antitrust* liability from harm attributable to other allegations for which ConAgra might be liable. Nor, for that matter, did either Mangum or Kinrich try to differentiate between ConAgra's liability and other potential causes of the losses that Kinrich measured. In other words, neither Kinrich's testimony nor Mangum's testimony attempted to show any form of causality, a critical element needed to establish antitrust injury, *Ashley Creek*, 315 F.3d at 1252, and a point upon which the judge instructed the jury correctly.

In short, Unitherm failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its Section 2 claim. Unitherm has presented conclusory testimony from its expert that defines the market as coterminous with the patent based entirely on issues of *technical* substitutability, described no market analysis, inferred market power from the possession of a patent, tautologically equated unsuccessful attempts at collecting royalties with a dangerous probability of success, and inferred antitrust injury from economic loss. ConAgra is correct in asserting that Unitherm failed to provide any evidence capable of sustaining the jury's finding of antitrust liability. We therefore vacate the court's judgment of ConAgra's antitrust liability and the award of the consequent damages.[7]

7. ConAgra failed to renew its motion for judgment as a matter of law ("JMOL") after the verdict pursuant to Federal Rules of Civil Procedure 50(b). Unitherm contends that ConAgra therefore waived its right to dispute the sufficiency of the evidence supporting the jury's antitrust verdict. We have ruled as a matter of Federal Circuit law that, for issues unique to our jurisdiction, a 50(b) motion is necessary to preserve a sufficiency of the evidence argument for appeal. *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 859-62 (Fed. Cir. 1991). On most issues related to Rule 50 motions, however, we generally apply regional circuit law unless the precise issue being appealed pertains uniquely to patent law. *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1106 (Fed. Cir. 2003). Because we decide antitrust issues that do not implicate patent law, including market definition, under the law of the regional circuits, *Nobelpharma*, 141 F.3d at 1067 n.5, we similarly apply Tenth Circuit law to determine whether or not ConAgra has preserved its right to appeal. In the Tenth Circuit, the failure of a party to move for a JMOL post-verdict does not bar the party from appealing the sufficiency of

(Cont'd)

E. Tortious Interference

ConAgra also appeals the jury verdict finding it liable for tortious interference with prospective economic advantage, a state law claim.[8] The Oklahoma Supreme Court has explained its approach to this tort largely by incorporation:

> Oklahoma jurisprudence teaches that one has the right to prosecute a lawful business without unlawful molestation or unjustified interference from any person, and any malicious interference with that business is an unlawful act and an actionable wrong. For a discussion of the difference between interference with a prospective economic advantage and with contractual or business relations, see *Overbeck v. Quaker Life Ins. Co.*, 757 P.2d 846, 847-48 (Okla. Civ. App. 1984). See in this connection [e.g.] *Lakeshore Community Hosp., Inc. v. Perry*, 538 N.W.2d 24, 27 (1995) . . . for the elements of

(Cont'd)
the evidence, provided, as is the case here, that the party made the appropriate motion prior to the submission of the case to the jury. *See Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 950-51 (10th Cir. 2004). The absence of a Rule 50(b) post-verdict motion for JMOL, however, precludes our entering judgment in favor of ConAgra. "The only remedy available is a new trial." *Id.* at 951. Thus, we may only vacate the jury's verdict in favor of Unitherm.

8. "Bad faith is a prerequisite to [a] state-law tortious interference claim; without it, the claim is preempted by patent law." *Zenith*, 182 F.3d at 1355.

> tortious interference with advantageous business relationships or prospective economic relations.

Gaylord Entm't Co. v. Thompson, 958 P.2d 128, 150, n.96 (Okla. 1998). "Interference with a prospective economic advantage usually involves interference with some type of reasonable expectation of profit, whereas interference with a contractual relationship results in loss of a property right." *Overbeck*, 757 P.2d at 847-48.

> The basic elements of tortious interference with a business relationship are the existence of a valid business relation or expectancy, knowledge of the relationship or expectancy on the part of the interferer, an intentional interference inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the party whose relationship has been disrupted.

Lakeshore Cmty., 538 N.W.2d at 27.

Oklahoma law therefore required Unitherm to prove first, that it possessed a reasonable expectation of future profits from future sales of its browning process (likely in conjunction with its ovens), and second, that ConAgra intentionally interfered with that reasonable expectation. *See Gaylord*, 958 P.2d at 150 n.96. Unitherm's President, David Howard, and of one of its salesmen, Ron Snider, both testified that they expected future profitable sales, and offered the names of prospective customers. Unitherm's damages expert, Dr. Kinrich, presented an event study purporting to show that Unitherm's business declined beginning about the

time that news of ConAgra's patent application spread throughout the industry. Kinrich also showed that his study measured losses somewhere between $4.5 million and $7.5 million.

This proffered evidence could lead a reasonable jury to conclude that Unitherm possessed a valid business expectancy.[9] ConAgra knew that Unitherm sold browning processes to pre-cooked meat producers, such as Jennie-O. ConAgra's attempts to enforce its fraudulently obtained patent were an intentional interference with the future of Unitherm's business relationship with Jennie-O, and Kinrich's model measured Unitherm's damages. The jury's finding was not inherently unreasonable given this evidence. Oklahoma courts must affirm a jury verdict if there is any competent evidence reasonably tending to support it. *Computer Publs.*, 49 P.3d at 735. We therefore affirm the jury's finding of liability for intentional interference with prospective advantage, and of the consequent damages.

---

9. Under Tenth Circuit law, ConAgra preserved its right to appeal the sufficiency of the evidence by moving for a directed verdict at the close of Unitherm's evidence and again at the close of its defense, despite failing to move for a post-verdict JMOL. *See Cummings*, 365 F.3d at 950-51.

Appendix A

CONCLUSION

Because the district court construed the only disputed term in the '027 Patent correctly and properly granted summary judgment that the '027 Patent is invalid and unenforceable under 35 U.S.C. § 102(b), we affirm those judgments. Because the district court was also correct, under Oklahoma law, in allowing the jury to decide the issue of tortious interference and to accept the jury's findings on both liability and damages, we affirm those judgments as well. Because the district court erred, however, in allowing the jury to decide Unitherm's antitrust claims despite the total absence of economic evidence capable of sustaining those claims, we vacate the judgment finding ConAgra liable for violating § 2 of the Sherman Act. We also vacate all damages awarded consequent to antitrust liability. We remand the matter to the district court for further proceedings consistent with this opinion.

AFFIRM-IN-PART, VACATE-IN-PART, AND REMANDED.

COSTS

Each party shall bear its own costs.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 14, 2004

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1472, -1473

UNITHERM FOOD SYSTEMS, INC.
and JENNIE-O FOODS, INC.,

Plaintiffs-Appellees,

v.

SWIFT-ECKRICH, INC.
(doing business as Conagra Refrigerated Foods),

Defendant-Appellant.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEES, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

Appendix B

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 21, 2004.

FOR THE COURT,

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: September 14, 2004

APPENDIX C — FEDERAL RULE OF CIVIL PROCEDURE 50

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial; Conditional Rulings.

If, for any reason, the court does not grant a motion for judgment as a matter of law made

at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

Appendix C

(d) Same: Denial of Motion for Judgment as a Matter of Law.

> If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

* * * *

No. 04-597

In the Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC., PETITIONER

v.

SWIFT-ECKRICH, INC. D/B/A CONAGRA REFRIGERATED FOODS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

MARLEIGH DOVER
AUGUST FLENTJE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	6
Argument	8
A. A post-verdict motion for judgment under Rule 50(b) is a prerequisite to appellate review of sufficiency challenges because district courts have discretion to deny pre-verdict motions for judgment even when the evidence is insufficient	10
1. The filing of a post-verdict motion for judgment under Rule 50(b) is not futile even when a pre-verdict Rule 50(a) motion has previously been denied	12
2. Post-verdict renewal of a prior motion for judgment ensures that the district court has an adequate opportunity to pass on the merits of the movant's sufficiency challenge and facilitates any appellate review that proves to be necessary	15
3. A district court's denial of a pre-verdict motion under Rule 50(a) cannot be deemed reversible error on the ground that the non-moving party's evidence was insufficient, because district courts have discretion to deny Rule 50(a) motions in such circumstances	18
B. Requiring a post-verdict motion for judgment as a matter of law as a prerequisite to appellate review of sufficiency challenges is consistent with this Court's prior decisions construing Rule 50(b), which are entitled to strong *stare decisis* effect	20

Table of Contents—Continued: Page

1. This Court should reject the remedial approach employed by the Federal Circuit in this case 21
2. This Court's prior decisions construing Rule 50(a) are entitled to strong *stare decisis* effect and should not be abandoned 24
Conclusion 28

TABLE OF AUTHORITIES

Cases:

Bergstrom-Ek v. *Best Oil Co.*, 153 F.3d 851 (8th Cir. 1998) 12
Biodex Corp. v. *Loredan Biomedical, Inc.*, 946 F.2d 850 (Fed. Cir. 1991), cert. denied, 504 U.S. 980 (1992) 17
Cone v. *West Va. Pulp & Paper Co.*, 330 U.S. 212 (1947) 16, 17, 20, 23
Cummings v. *General Motors Corp.*, 365 F.3d 944 (10th Cir. 2004) 21, 22
Faragher v. *City of Boca Raton*, 524 U.S. 775 (1998) 24, 28
Flannery v. *President of Georgetown Coll.*, 679 F.2d 960 (D.C. Cir. 1982) 12
Freytag v. *Commissioner*, 501 U.S. 868 (1991) 9
Globe Liquor Co. v. *San Roman*, 332 U.S. 571 (1948) 18, 20, 23
Henderson v. *United States*, 517 U.S. 654 (1996) 25
Hilton v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) 25
Hormel v. *Helvering*, 312 U.S. 552 (1941) 8
Hubbard v. *United States*, 514 U.S. 695 (1995) 24
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 24
Johnson v. *New York, New Haven & Hartford R.R.*, 344 U.S. 48 (1952) 3, 13, 14, 15, 17, 20, 23, 26

Cases—Continued: Page

McPhillamy v. *Brown & Root, Inc.*, 810 F.2d 529 (5th Cir. 1987) 12, 19
Neely v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967) 14, 20, 22, 27
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 25
Sibbach v. *Wilson & Co.*, 312 U.S. 1 (1941) 25
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) 27, 28
Swift-Eckrich, Inc. v. *Unitherm Food Sys., Inc.*, 125 S. Ct. 1399 (2005) 10
Therrell v. *Georgia Marble Holdings Corp.*, 960 F.2d 1555 (11th Cir. 1992) 12
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 24
Unitherm Food Sys. Inc. v. *Swift-Eckrich, Inc.*, 125 S. Ct. 1396 (2004) 4, 24
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 18
Weisgram v. *Marley Co.*, 528 U.S. 440 (2000) 20
Williams v. *County of Westchester*, 171 F.3d 98 (2d Cir. 1999) 12
Yakus v. *United States*, 321 U.S. 414 (1944) 8

Statutes and rules:

Rules Enabling Act, 28 U.S.C. 2071 *et seq.*:
28 U.S.C. 2072 ..... 8, 25
28 U.S.C. 2072(a) 25
28 U.S.C. 2074 ..... 8, 25
28 U.S.C. 2074(a) 25
28 U.S.C. App. Fed. R. Civ. P. 50 note 27
Sherman Act, § 2, 15 U.S.C. 2 3
Fed. R. Civ. P.:
Rule 46 9
Rule 50 ..... *passim*
Rule 50(a) ..... *passim*
Rule 50(a)(1) 2, 9

Rules—Continued:	Page
Rule 50(a)(2)	2, 9
Rule 50(b)	*passim*
Rule 50(c)	26
Rule 50(d)	22, 26
Rule 59	4, 24
Miscellaneous:	
Amendments to Federal Rules of Civil Procedure, 134 F.R.D. 525 (1991)	12, 19
Amendments to Rules of Civil Procedure for the United States District Courts, 31 F.R.D. 587 (1963)	26, 27
9 James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 2005)	12, 16
Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 1995)	3, 8, 9, 12, 19

In the Supreme Court of the United States

No. 04-597

UNITHERM FOOD SYSTEMS, INC., PETITIONER

v.

SWIFT-ECKRICH, INC. D/B/A CONAGRA REFRIGERATED FOODS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the party that receives an adverse verdict in a civil jury trial must file a timely post-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) in order to preserve a sufficiency-of-the-evidence challenge for appeal. The United States and its agencies are the Nation's most frequent litigants and are often parties to civil jury trials. Because this Court's resolution of the question presented can be expected to affect the conduct of the government's own litigation, the United States has a significant interest in the disposition of this case. The United States also has an interest in the development and enforcement of appropriate standards governing preservation and waiver of issues for appeal. Such standards help to ensure the just and efficient

operation of the federal courts, goals that would hindered by adoption of the rule applied by the court of appeals in this case. More generally, the United States has an interest in the consistent and predictable application of established rules of procedure, both because of its status as a frequent litigant and because of the *ex officio* participation of Department of Justice attorneys on advisory committees concerning the various Federal Rules. That interest would be compromised by acceptance of respondent's contention that the Court should depart in this case from its prior interpretation of Rule 50(b).

STATEMENT

1. Federal Rule of Civil Procedure 50(a)(1) provides in pertinent part that, "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party." A motion under Rule 50(a) may be made "at any time before submission of the case to the jury." Fed. R. Civ. P. 50(a)(2).

Federal Rule of Civil Procedure 50(b) states:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned:

> (A) allow the judgment to stand,
>
> (B) order a new trial, or
>
> (C) direct entry of judgment as a matter of law; or
>
> (2) if no verdict was returned;
>
> (A) order a new trial, or
>
> (B) direct entry of judgment as a matter of law.

Fed. R. Civ. P. 50(b).[1] In construing a predecessor version of Rule 50(b), this Court held that "in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment." *Johnson* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 48, 50 (1952); see *id.* at 50 n.1 (reproducing text of Rule 50(b) in effect at that time).

2. Petitioner Unitherm Food Systems sued respondent Swift-Eckrich, Inc., d/b/a Conagra Refrigerated Foods, in the United States District Court for the Western District of Oklahoma. Pet. 2. Petitioner alleged, *inter alia*, that (1) it was entitled to a declaratory judgment that respondent's patent involving precooked meats was invalid; (2) respondent had tortiously interfered with petitioner's prospective economic relationships in violation of state law; and (3) respondent had violated Section 2 of the Sherman Act, 15 U.S.C. 2, by attempting to monopolize the relevant market through enforcement of a fraudulently obtained patent. Pet.

---

[1] Until Federal Rule of Civil Procedure 50 was amended in 1991, a pre-verdict motion under Rule 50(a) was known as a motion for "directed verdict," while a post-verdict motion under Rule 50(b) was known as a motion for "judgment notwithstanding the verdict" or judgment "non obstante veredicto" ("j.n.o.v."). See Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521, at 242-243 & n.12 (2d ed. 1995). Under Rule 50 in its current form, both the pre- and post-verdict motions are known as motions for "judgment as a matter of law."

App. 3a-5a, 26a-27a. The district court granted summary judgment for petitioner on its patent-invalidity claim, see *id.* at 8a, and the other claims proceeded to trial.

The opinion of the Federal Circuit indicates that respondent filed a pre-verdict motion for judgment as a matter of law based on the alleged insufficiency of the evidence to support a verdict in petitioner's favor on the antitrust claim. See Pet. App. 50a-51a n.7; p. 6, *infra*. While asserting that respondent failed to raise that issue in its pre-verdict motion for judgment, petitioner has expressed a willingness to have the case decided on the assumption that an adequate Rule 50(a) motion was made. See Pet. 6-7 n.4. This Court's reformulation of the question presented makes clear that the case will be decided on the understanding that respondent "made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury." *Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 125 S. Ct. 1396, 1397 (2005).

The jury found respondent liable for tortious interference with prospective economic relationships, and it awarded $2 million in actual damages and an additional $2 million in punitive damages on that claim. Pet. App. 11a. The jury also found for petitioner on the antitrust claim and awarded damages that, after trebling, amounted to $18 million. *Ibid.* Respondent did not move for judgment as a matter of law pursuant to Rule 50(b) after the jury rendered its verdict. See *id.* at 50a n.7. The question on which this Court has granted certiorari assumes, and it appears to be undisputed, that respondent also did not file a motion for new trial on the issue of antitrust liability under Federal Rule of Civil Procedure 59. *Unitherm*, 125 S. Ct. at 1397.

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-54a. The Federal Circuit affirmed the district court's grant of summary judgment on petitioner's patent-invalidity claim. *Id.* at 26a. The court

also affirmed the judgment on the tortious-interference claim, stating that the evidence was sufficient to support the jury verdict in petitioner's favor. *Id.* at 53a.

The court of appeals vacated the district court's judgment on the antitrust claim. Pet. App. 26a-50a. The court reviewed the pertinent record evidence (*id.* at 44a-49a) and concluded that petitioner had "failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its Section 2 claim." *Id.* at 50a. The court of appeals declined to direct the district court to enter judgment in petitioner's favor on the antitrust claim, however, holding that its remedial authority was limited to vacatur of the judgment of liability and the award of antitrust damages. See *id.* at 50a-51a n.7.

The court of appeals explained that, under the approach followed by the relevant regional circuit, respondent's failure to file a post-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) did not preclude respondent from contesting the sufficiency of the evidence supporting the jury verdict on the antitrust claim, but it did bar the court of appeals from directing the district court to enter judgment in respondent's favor. The court explained:

> [Respondent] failed to renew its motion for judgment as a matter of law (JMOL) after the verdict pursuant to Federal Rules of Civil Procedure 50(b). [Petitioner] contends that [respondent] therefore waived its right to dispute the sufficiency of the evidence supporting the jury's antitrust verdict. We have ruled as a matter of Federal Circuit law that, for issues unique to our jurisdiction, a [post-verdict Rule] 50(b) motion is necessary to preserve a sufficiency of the evidence argument for appeal. On most issues related to Rule 50 motions, however, we generally apply regional circuit law unless the precise issue being appealed pertains uniquely to patent law. Be-

cause we decide antitrust issues that do not implicate patent law, including market definition, under the law of the regional circuits, we similarly apply Tenth Circuit law to determine whether or not [respondent] has preserved its right to appeal. In the Tenth Circuit, the failure of a party to move for a JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence, provided, as is the case here, that the party made the appropriate motion prior to the submission of the case to the jury. The absence of a Rule 50(b) post-verdict motion for JMOL, however, precludes our entering judgment in favor of [respondent]. The only remedy available is a new trial. Thus, we may only vacate the jury's verdict in favor of [petitioner].

Pet. App. 50a-51a n.7 (citations and internal quotation marks omitted).

SUMMARY OF ARGUMENT

A. Even when the district court correctly believes that the evidence presented at trial is insufficient to support a verdict in favor of the non-moving party, the court may properly decline to grant a pre-verdict motion for judgment as a matter of law filed under Federal Rule of Civil Procedure 50(a). By deferring consideration of the legal and evidentiary issues raised by such a motion until the jury has rendered its verdict, the court can avoid the need for a retrial that would result if it granted the Rule 50(a) motion and its ruling were reversed on appeal.

The discretionary nature of the district court's task in acting on a Rule 50(a) motion is central to the resolution of the Rule 50(b) questions presented here. Because the court may have sound reasons for granting a post-verdict Rule 50(b) motion even after it has denied relief under Rule 50(a), renewal of a motion for judgment as a matter of law after the jury has rendered its verdict cannot properly be regarded as

a futile endeavor. Rule 50(b) provides a specific mechanism through which the party that receives an adverse jury verdict may contest the sufficiency of its opponent's evidence, and the filing of a motion under that Rule ensures that the district court has an adequate opportunity to resolve the sufficiency issue in the first instance. In light of the discretion vested in the district court by Rule 50(a), moreover, an appellate court's ruling that the evidence was insufficient to support a verdict for the non-moving party would not establish that the district court erred in denying the Rule 50(a) motion. Such a ruling therefore does not preserve the distinct Rule 50(b) issue or provide a basis for reversal or vacatur of the district court's judgment.

B. This Court has repeatedly construed Federal Rule of Civil Procedure 50(b) to preclude a court of appeals from directing entry of a judgment contrary to the jury's verdict unless the appellant filed a timely post-verdict motion under that Rule. There is no sound basis for the remedial approach followed below, under which respondent's failure to seek post-verdict relief under Rule 50(b) precluded the court of appeals from directing entry of judgment in respondent's favor, but did not prevent it from reviewing the sufficiency of petitioner's evidence and ordering a new trial. While that result is not expressly foreclosed by this Court's holdings, it conflicts with the Court's reasoning and with common sense. The perverse and inefficient result of that approach is that respondent, which submitted a pre-verdict request for judgment as a matter of law in the district court, but did not seek a new trial on the issue of antitrust liability after the jury rendered its verdict, is entitled to a new trial but not to entry of a favorable judgment. That remedial scheme cannot be reconciled with the fundamental principle that appellate courts review those claims, and only those claims, that were adequately preserved in the trial court. Given the court of appeals' established lack of authority to direct entry of

judgment in these circumstances, the more logical inference is that the appellate court is also precluded from reviewing the merits of respondent's sufficiency challenge.

Contrary to respondent's contention, there is no warrant for this Court to reconsider its prior decisions construing Rule 50(b). Because Rule 50(b) is subject to amendment either by Congress through the enactment of new legislation, or by this Court pursuant to the Rules Enabling Act, see 28 U.S.C. 2072, 2074, the Court's precedents interpreting and applying the Rule are entitled to strong *stare decisis* effect. Respondent errs in contending that amendments to Rule 50 adopted in 1963 have superseded those precedents. To the contrary, the fact that this Court has repeatedly amended Rule 50 during the past several decades, without providing the courts of appeals with the remedial authority that was found lacking in prior cases, makes it all the more appropriate to adhere to those decisions as a matter of *stare decisis*.

ARGUMENT

"Ordinarily an appellate court does not give consideration to issues not raised below." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); cf., *e.g.*, *Yakus* v. *United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). That rule "is not a mere technical formality and is essential to the orderly administration of civil justice." Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2472, at 94 (2d ed. 1995). The requirement of a contemporaneous objection or request for judicial action, as a prerequisite to appellate review, ensures that the trial court is given an adequate opportunity to address the relevant legal question in the first instance. That procedure increases the likelihood that the trial proceedings will be conducted in conformance with law, thereby conserving the resources of the litigants and the appellate courts. A contemporaneous objection or request may also induce the trial court to provide an explanation of its ruling that will facilitate any appellate review that proves to be necessary. See *Freytag* v. *Commissioner*, 501 U.S. 868, 900 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("Without th[e] incentive to raise legal objections as soon as they are available, the time of lower court judges and of juries would frequently be expended uselessly, and appellate consideration of difficult questions would be less informed and less complete.").[2]

Federal Rule of Civil Procedure 50 provides two complementary mechanisms by which a litigant in a suit tried to a jury may contest the sufficiency of the trial evidence offered to support its opponent's case. Under Rule 50(a), a party may request that the district court enter judgment as a matter of law "at any time before submission of the case to the jury," and the district court "may" grant such a motion if the evidence would not support a verdict in favor of the nonmoving party. Fed. R. Civ. P. 50(a)(1) and (2). If the district court does not grant the Rule 50(a) motion, Rule 50(b) per-

---

[2] The requirement of a contemporaneous objection or request for judicial action is a longstanding principle of civil litigation that is currently reflected in Federal Rule of Civil Procedure 46. Rule 46 provides in pertinent part that "[f]ormal exceptions to rulings or orders of the [district] court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor." Fed. R. Civ. P. 46. "Even though [Rule 46] makes exceptions unnecessary, it does not end the need to object to actions by the trial court, or to let it know the action the party wishes it to take." Wright & Miller, *supra*, § 2471, at 93. The functions previously served by formal exceptions "are just as important under the [Federal Rules of Civil Procedure] as they ever were, but less formality is required in performing them." *Ibid.*

mits the movant to "renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment." Fed. R. Civ. P. 50(b).

Respondent appears to acknowledge that a litigant's challenge to the sufficiency of its opponent's evidence may be asserted on appeal only if such a challenge has first been presented to the district court. Respondent contends, however, that a pre-verdict motion under Rule 50(a) is adequate to preserve a sufficiency challenge for appellate review. See, *e.g.*, 04-819 Cond. Cross-Pet. at 14 (respondent argues that a post-verdict motion under Rule 50(b) is unnecessary "to preserve the full range of rights on appeal when a pre-verdict motion has been made under Rule 50(a)").[3] This Court should reject that contention, and should hold that a timely post-verdict motion under Rule 50(b) is a prerequisite to appellate review of any challenge to the sufficiency of the evidence supporting a jury's verdict. Enforcement of that requirement better serves the purposes that underlie contemporaneous-objection rules generally, and is more faithful to the text and structure of Rule 50 and to this Court's prior decisions interpreting the Rule.

A. A Post-Verdict Motion For Judgment Under Rule 50(b) Is A Prerequisite To Appellate Review Of Sufficiency Challenges Because District Courts Have Discretion To Deny Pre-Verdict Motions For Judgment Even When The Evidence Is Insufficient

By its terms, Federal Rule of Civil Procedure 50(a) confers discretion upon the district court, stating that, if "there is no legally sufficient basis for a reasonable jury to find for"

[3] Respondent did not file a response to the petition for a writ of certiorari in this case, but it did file a conditional cross-petition for a writ of certiorari. See *Swift-Eckrich, Inc.* v. *Unitherm Food Sys., Inc.*, No. 04-819. This Court denied the conditional cross-petition on February 28, 2005. See 125 S. Ct. 1399.

a particular party on a given issue, "the court *may* determine the issue against that party and *may* grant a motion for judgment as a matter of law against that party." Fed. R. Civ. P. 50(a) (emphases added). Thus, the plain text of the Rule authorizes the district court to deny a pre-verdict motion for judgment as a matter of law even if it correctly appears to the court that no reasonable jury could find in favor of the non-moving party.

There is sound reason for that discretion. As one leading treatise explains:

> Even at the close of all the evidence it may be desirable to refrain from granting a motion for judgment as a matter of law despite the fact that it would be possible for the district court to do so. If judgment as a matter of law is granted and the appellate court holds that the evidence in fact was sufficient to go to the jury, an entire new trial must be had. If, on the other hand, the trial court submits the case to the jury, though it thinks the evidence insufficient, final determination of the case is expedited greatly. If the jury agrees with the court's appraisal of the evidence, and returns a verdict for the party who moved for judgment as a matter of law, the case is at an end. If the jury brings in a different verdict, the trial court can grant a renewed motion for judgment as a matter of law. Then if the appellate court holds that the trial court was in error in its appraisal of the evidence, it can reverse and order judgment on the verdict of the jury, without any need for a new trial. For this reason the appellate courts repeatedly have said that it usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion.

Wright & Miller, *supra*, § 2533, at 319 (footnote omitted).[4] The Advisory Committee Note accompanying the 1991 amendments to Rule 50(b) is to the same effect, stating that, "because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided * * *, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence." *Amendments to Federal Rules of Civil Procedure*, 134 F.R.D. 525, 687 (1991) (*1991 Amendments*). In three related respects, the discretionary nature of the district court's task when confronted with a Rule 50(a) motion is central to the resolution of the question presented here.

1. ***The filing of a post-verdict motion for judgment under Rule 50(b) is not futile even when a preverdict Rule 50(a) motion has previously been denied***

Respondent contends that, "[i]n essence, [petitioner's] argument is that for [respondent] to have preserved its right to appeal, it was required to engage in an empty formality: [respondent] had to make its motion to dismiss the antitrust claim twice." 04-819 Cond. Cross-Pet. at 17. The Court has already rejected that argument in *Johnson*, noting that Rule 50(b)'s "requirement of a timely application for judgment

[4] Accord, *e.g.*, *Williams* v. *County of Westchester*, 171 F.3d 98, 102 (2d Cir. 1999); *Bergstrom-Ek* v. *Best Oil Co.*, 153 F.3d 851, 859 n.3 (8th Cir. 1998); *Therrell* v. *Georgia Marble Holdings Corp.*, 960 F.2d 1555, 1569 (11th Cir. 1992); *McPhillamy* v. *Brown & Root, Inc.*, 810 F.2d 529, 533 (5th Cir. 1987); *Flannery* v. *President of Georgetown Coll.*, 679 F.2d 960, 962 (D.C. Cir. 1982) (per curiam). See also 9 James Wm. Moore et al., *Moore's Federal Practice* § 50.33, at 50-54 (3d ed. 2005) (in order to ensure that "the jury verdict may be reinstated without a costly retrial if the reviewing court finds that judgment as a matter of law was erroneously granted * * *, many courts of appeal[s] emphasize the wisdom and expediency of reserving a ruling on pre-verdict motions for judgment until the jury has the opportunity to weigh the evidence").

after verdict is not an idle motion." 344 U.S. at 53. If the district court were *required* to grant a Rule 50(a) motion whenever the court deemed the non-moving party's evidence to be insufficient as a matter of law, there might indeed be little reason to suppose that a court, having denied such a motion initially, would reach a different conclusion after the jury had found *against* the moving party. As noted, however, in order to facilitate the fair and expeditious resolution of civil lawsuits, the district court may properly decline to grant relief under Rule 50(a) even if it regards the non-moving party's evidence as insufficient and intends to grant a Rule 50(b) motion if the jury finds against the movant. See pp. 10-12, *supra*. In light of the established legitimacy of that practice, there is no basis for treating the post-verdict renewal of a motion for judgment under Rule 50(b) as a merely formal or futile endeavor.

In a particular case, the district court's stated rationale for denying a pre-verdict motion under Rule 50(a) may be sufficiently explicit and emphatic as to negate any meaningful likelihood that the court will reach a different conclusion after the verdict is in. But this Court should avoid an approach that provokes hair-splitting arguments concerning the definitiveness of a particular judge's explanation of his or her ruling. See *Johnson*, 344 U.S. at 53 ("Rule 50(b) as written and as construed by us is not difficult to understand or to observe. Rewriting the rule to fit counsel's unexpressed wants and intentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was adopted to end."). Because a court's refusal to grant pre-verdict relief under Rule 50(a) does not, as a general matter, foreclose any realistic possibility that a post-verdict motion will be granted, there is no basis for a "futility" exception to the

usual rule that relief not requested from the trial court cannot be obtained from the court of appeals.[5]

Nor would it be appropriate to distinguish, for purposes of appellate review of sufficiency-of-evidence challenges, between cases in which the district court explicitly reserves its ruling on the Rule 50(a) motion and those in which it denies the motion outright. In addition to the line-drawing problems that such an approach would create (cf. p. 13, *supra*), the text of Rule 50(b) does not countenance such an endeavor. The first sentence of Rule 50(b) states that "[i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion."

Thus, even if the district court states unequivocally that it is denying relief under Rule 50(a) because it regards the nonmoving party's evidence as sufficient to support a verdict, the court's submission of the case to the jury is made subject, as a matter of law, "to the court's later deciding the legal questions raised by the motion." See *Johnson*, 344 U.S. at 53 (explaining that Rule 50(b) "mak[es] it wholly unnecessary for a judge to make an express reservation of his decision on a motion for directed verdict," because "[t]he rule itself made the reservation automatic"); *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967) ("Under Rule 50(b), if a party moves for a directed verdict at the close of the evi-

[5] Respondent suggests that the district court's prior rulings in this case made clear that any post-verdict motion under Rule 50(b) would have had no realistic prospect of success. See, *e.g.*, 04-819 Cond. Cross-Pet. at 16 ("During trial, the trial judge several times expressed her desire not to hear further about [respondent's] position on the deficiencies of the antitrust claim."). Respondent does not identify record materials that would support that conclusion, however, nor does it suggest a workable standard that could be used to determine in an efficient and predictable manner whether a Rule 50(b) motion would have been futile in a particular case.

dence and if the trial judge elects to send the case to the jury, the judge is 'deemed' to have reserved decision on the motion."). Because Rule 50(b) by its terms treats *any* failure or refusal to grant a Rule 50(a) motion as a reservation of the district court's decision, it would be inappropriate for a court of appeals to decide that a particular Rule 50(a) denial "really" reflected the district court's final word on the matter.

2. Post-verdict renewal of a prior motion for judgment ensures that the district court has an adequate opportunity to pass on the merits of the movant's sufficiency challenge and facilitates any appellate review that proves to be necessary

As explained above, Federal Rule of Civil Procedure 50(b) provides that, when the district court declines to grant a pre-verdict Rule 50(b) motion for judgment, the court is "considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." In effect, therefore, Rule 50(b) treats the denial of a pre-verdict motion for judgment as merely a tentative ruling subject to "later deci[sion]." The next sentence of Rule 50(b) then specifies the procedural mechanism by which that "later deci[sion]" is to be made: "The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment." If a party declines to renew its motion after verdict, it has waived its right to obtain a final ruling from the district court on the sufficiency of the evidence, and accordingly should not be permitted to raise that issue on appeal.[6]

[6] This Court has stated that "in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict [Rule 50(b)] forbids *the trial judge* or an appellate court to enter such a judgment." *Johnson* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 48, 50 (1952) (emphasis added). That statement indicates that, even if the district court expressly reserves its decision on

There are substantial practical reasons for barring appellate review of sufficiency issues unless the appellant has first presented its sufficiency challenge in the manner prescribed by Rule 50(b), thereby ensuring that the district court is given a full and fair opportunity to rule on those issues after the conclusion of the trial. In the midst of a jury trial, the district court may lack the time and resources necessary to conduct a detailed review of the record and make a final determination regarding the sufficiency of the evidence to support particular claims or defenses, yet it is the trial court that is best positioned to make those determinations as an initial matter. As this Court recognized in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Id.* at 216. "Exercise of this discretion presents to the trial judge an opportunity * * * to view the

a Rule 50(a) motion until after the jury has rendered its verdict, Rule 50(b) precludes the district court from setting aside the jury verdict and granting judgment as a matter of law unless the losing party renews its prior request by filing a timely post-verdict motion. If that characterization of Rule 50(b) is treated as controlling, a litigant's failure to file a post-verdict motion for judgment would clearly deprive the district court of an adequate opportunity to pass on sufficiency issues in the first instance. Notwithstanding the *Johnson* Court's statement that trial courts lack authority to grant a post-verdict judgment for the losing party in the absence of a timely Rule 50(b) motion, however, "several lower courts have ignored this language as nothing more than dictum, because it appeared in a case concerning the power of appellate courts to enter judgment as a matter of law in the absence of a proper post-verdict motion." 9 *Moore's Federal Practice*, *supra*, § 50.05[5][b][ii], at 50-28 to 50-29 (footnotes omitted). But even assuming, *arguendo*, that the district court would have *power* to enter judgment for the verdict loser in the absence of a post-verdict motion, the litigant's express request for judgment under Rule 50(b) should be treated as a prerequisite to appellate review of any sufficiency challenge, for all the reasons set forth in text.

proceedings in a perspective peculiarly available to him alone." *Ibid.* As the *Cone* Court suggested, Rule 50 should be construed so as to afford the district judge "a last chance to correct his own errors without delay, expense, or other hardships of an appeal." *Ibid.* (citation omitted); see *Johnson*, 344 U.S. at 53 ("The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness.").

A renewed motion for judgment as a matter of law under Rule 50(b) may serve a useful function, moreover, even if it is ultimately denied. In light of the district court's greater familiarity with the trial record, that court's identification of the evidence that it believes supports the jury's verdict (and its explanation for rejecting the losing party's sufficiency challenge) can be expected substantially to facilitate any subsequent appellate review.[7] Although the district court is not required to give reasons for denying a motion under either Rule 50(a) or Rule 50(b), the court clearly has a greater incentive to provide a detailed explanation of its denial of a motion filed under Rule 50(b) (when the jury has found against the moving party, and the prospect of an appeal on the sufficiency question is real and immediate) than of its denial of a pre-verdict motion filed under Rule 50(a) (when the possibility still exists that a jury verdict in the movant's favor will moot the sufficiency question altogether). That is particularly true when the propriety of entering judgment contrary to the jury's verdict potentially depends on the resolution of antecedent legal issues such as the admissibility

[7] "The appellate process materially benefits by a comprehensive summary of the course of proceedings below and an impartial review of the evidence supporting a verdict. The appellant is directed to the probative evidence contrary to his or her position and the appellate court need not sift through the entire record searching for such contrary evidence." *Biodex Corp.* v. *Loredan Biomedical, Inc.*, 946 F.2d 850, 859 (Fed. Cir. 1991), cert. denied, 504 U.S. 980 (1992).

of evidence. See *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, 573-574 (1948).

By giving the district court a chance to explain its decision at a time when the practical significance of that ruling is apparent, a renewed motion for judgment as a matter of law under Rule 50(b) may thus assist the appellate court even if that motion is denied. Appellate courts should not be deprived of the benefit of the district court's most considered judgment by an interpretation of Rule 50 that permits appellants to obtain appellate review of sufficiency determinations without first filing a Rule 50(b) motion.[8]

3. A district court's denial of a pre-verdict motion under Rule 50(a) cannot be deemed reversible error on the ground that the non-moving party's evidence was insufficient, because district courts have discretion to deny Rule 50(a) motions in such circumstances

Respondent observes that, although motions of many sorts may be and sometimes are renewed after the district court's initial denial of relief, "the fact that a motion is *not* renewed when the opportunity arises does not mean that the original motion can no longer serve as the basis for an appeal." 04-819 Cond. Cross-Pet. at 14. While that is true as a general matter, it is not true of motions filed under Federal

[8] If the party that receives an adverse jury verdict in a civil suit believes that the district court would be unlikely to grant a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), but the court has not previously offered a detailed, on-the-record description of the evidence supporting the verdict winner's claim, the losing party might have an incentive to forgo a Rule 50(b) motion so that the court of appeals will review any sufficiency challenge without the benefit of the district court's analysis. Treating a Rule 50(b) motion as a prerequisite to appellate review of a challenge to the sufficiency of the evidence supporting a jury verdict eliminates that incentive. Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977) (refusal to enforce procedural default rules may encourage "sandbagging" by trial counsel).

Rule of Civil Procedure 50. Because the district court has broad discretion in ruling on Rule 50(a) motions, and may properly deny a motion even if the court believes that the evidence is insufficient to support a verdict against the nonmoving party, an appellate court's determination that the evidence was insufficient would not establish that the district court *erred* in denying the Rule 50(a) motion. See *McPhillamy* v. *Brown & Root, Inc.*, 810 F.2d 529, 532-533 (5th Cir. 1987) (even if trial evidence was such that the district court could legitimately have granted pre-verdict motion under Rule 50(a), court's failure to do so could not properly be characterized as error, since submission of doubtful cases to the jury will often expedite resolution of civil lawsuits). And, absent identified *error* by the trial court, there would be no basis for the court of appeals to disturb the judgment.[9]

[9] Although a pre-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) is not by itself adequate to preserve a sufficiency challenge for appellate review, such a motion is an essential prerequisite to a post-verdict request for judgment under Rule 50(b). As the Advisory Committee Note accompanying the 1991 amendments to Rule 50(b) explains, the Rule in its current form

> retains the concept of the former rule that the post-verdict motion is a renewal of the earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.

1991 Amendments, 134 F.R.D. at 687; see Wright & Miller, *supra*, § 2537, at 335-336 ("A post-verdict motion under Rule 50(b) for judgment as a matter of law cannot be made unless a previous motion for judgment as a matter of law was made by the moving party at the close of all the evidence."). The requirement of a pre-verdict motion ensures "that the responding party may seek to correct any overlooked deficiencies in the proof" before the case is submitted to the jury. *1991 Amendments*, 134 F.R.D. at 686. Thus, the practical effect of Rule 50 is that a litigant must

B. Requiring A Post-Verdict Motion For Judgment As A Matter Of Law As A Prerequisite To Appellate Review Of Sufficiency Challenges Is Consistent With This Court's Prior Decisions Construing Rule 50(b), Which Are Entitled To Strong *Stare Decisis* Effect

This Court has repeatedly held that, if the party that receives an adverse verdict in a civil jury trial fails to submit a timely post-verdict motion under Federal Rule of Civil Procedure 50(b), the court of appeals lacks power to direct the district court to enter a judgment contrary to the verdict of the jury. See *Johnson*, 344 U.S. at 50; *Globe Liquor Co.*, 332 U.S. at 572-574; *Cone* v. *West Va. Pulp & Paper Co.*, 330 U.S. 212, 215-218 (1947).[10] The Federal Circuit in this case recognized that, under those decisions, respondent's failure to file a timely Rule 50(b) motion precluded the court of appeals from directing the entry of judgment in respondent's favor. The court of appeals nevertheless reviewed and accepted respondent's contention that the trial evidence was insufficient to support the jury verdict on petitioner's antitrust cause of action. Having reached that conclusion, and being barred by *Johnson*, *Globe Liquor*, and *Cone* from ordering the relief that would most naturally follow—*i.e.*, entry of judgment for respondent—the court nonetheless granted a new trial. See Pet. App. 50a-51a n.7.

Rather than defend the Federal Circuit's ruling, which can be squared with the holdings but not the logic of *Johnson*, *Globe Liquor*, and *Cone*, respondent has urged the Court to "revisit the question" previously decided in those cases. 04-819 Cond. Cross-Pet. at 18. Respondent contends that its submission of a pre-verdict motion under Rule 50(a) should be sufficient to preserve its right to any otherwise-appropriate appellate remedy, including an order directing the district court to enter judgment in respondent's favor. See *id.* at 14-18.

Neither of those approaches is sound. In light of the established rule that the court of appeals in this situation lacked power to direct entry of judgment, it is illogical to permit the court to review the sufficiency of petitioner's evidence and to order a form of relief—a new trial on the question of antitrust liability—that respondent *never* requested in the district court. Moreover, this Court's decisions interpreting the Federal Rules of Civil Procedure are entitled to strong *stare decisis* effect, and respondent has offered no sound basis for departing from those precedents.

1. *This Court should reject the remedial approach employed by the Federal Circuit in this case*

In determining the scope of its review and of its remedial authority in this case, the Federal Circuit applied Tenth Circuit precedent. See Pet. App. 50a-51a n.7. The Tenth Circuit has recognized that, under this Court's decisions, a litigant's failure to file a timely post-verdict motion under Rule 50(b) precludes a court of appeals from directing the district court to enter a judgment contrary to the verdict of the jury. See, *e.g.*, *Cummings* v. *General Motors Corp.*, 365 F.3d 944, 951 (2004). The Tenth Circuit has nevertheless concluded that the absence of a Rule 50(b) motion does not bar the party receiving an adverse verdict from raising a claim of evidentiary insufficiency on appeal. In such cases, the Tenth Circuit has held, the sufficiency challenge may go forward, but "the only remedy available is a new trial," even if the

---

seek judgment as a matter of law in the district court both before and after the jury verdict in order to preserve a claim of evidentiary insufficiency for appeal.

[10] The Court subsequently determined in *Neely* that, if a timely post-verdict motion is filed in the district court under Rule 50(b), and the court of appeals later concludes that the evidence at trial was insufficient to support the jury verdict, the court of appeals may, in an appropriate case, direct the district court to enter judgment in the movant's favor. 386 U.S. at 319-330; see *Weisgram* v. *Marley Co.*, 528 U.S. 440, 449-452 (2000).

court of appeals concludes that the jury verdict lacks any evidentiary basis. *Ibid.* Relying on *Cummings*, the Federal Circuit in the instant case vacated the judgment in petitioner's favor on the antitrust claim but did not order the district court to enter judgment for respondent. See Pet. App. 50a-51a & n.7.

The remedial scheme devised by the Tenth Circuit has little to recommend it. Under that approach, an unrenewed pre-verdict motion under Rule 50(a) will be deemed insufficient to preserve the movant's entitlement to the remedy actually sought in the unrenewed Rule 50(a) motion—the entry of judgment in the movant's favor—but sufficient to preserve a claim for a form of relief that the Rule 50(a) movant never actually sought below—a new trial. Given the established rule that an appellate court cannot order judgment in the appellant's favor unless a timely Rule 50(b) motion was filed, the much more logical conclusion is that an unrenewed Rule 50(a) motion is simply inadequate to preserve a claim of evidentiary insufficiency.[11]

[11] This is not to say that an order directing judgment in the appellant's favor is the *only* permissible remedy when a sufficiency challenge has been properly preserved through a timely Rule 50(b) motion and the court of appeals subsequently determines that the jury verdict is unsupported by the evidence. Federal Rule of Civil Procedure 50(d) makes clear that, "[i]f the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." This Court in *Neely* recognized that, even when the court of appeals holds that the evidence is insufficient to support the jury's verdict, there may be valid reasons for the appellate court to order a new trial, or to leave the choice of remedies to the district court's informed discretion, rather than to direct the entry of judgment in the appellant's favor. See 386 U.S. at 325-327. But the fact that a new trial will *sometimes* be the appropriate relief in cases of this nature does not provide a persuasive rationale for the remedial scheme adopted by the Tenth Circuit and applied by the Federal Circuit here, under which an unrenewed Rule 50(a) motion is considered adequate to preserve claims of evidentiary insufficiency, but not to preserve the movant's right to what would otherwise be an appropriate (and indeed the most natural) appellate remedy in the event that such a claim is upheld.

The Tenth Circuit's approach also imposes substantial inefficiencies on the federal courts, because it compels district courts to convene new jury trials in cases where the correct result—but for the appellant's failure to file a Rule 50(b) motion—would have been the entry of judgment as a matter of law. The consequences of the failure to seek Rule 50(b) relief thus fall most heavily on jurors, court personnel, and already clogged court calendars. Neither respondent nor the courts that follow the Tenth Circuit's approach have identified any plausible justification for imposing those substantial costs on the federal judicial system.

To be sure, if a litigant files a pre-verdict motion for judgment as a matter of law under Rule 50(a), fails to renew that motion after an adverse verdict within the time allowed by Rule 50(b), but *does* file a timely post-verdict motion for a new trial under Federal Rule of Civil Procedure 59, the court of appeals may order a new trial but cannot direct the entry of judgment in the litigant's favor. But in that scenario, the court of appeals is awarding relief that the litigant *actually sought* in the district court, and the result is therefore consistent with the general rule that an appellate court can review those claims, and only those claims, that were adequately preserved in the trial court.[12] In the instant case, however, the question on which this Court has granted certiorari assumes (and it appears to be undisputed) that respondent did *not* file a post-verdict motion for new trial on

[12] The appellants in *Cone* (see 330 U.S. at 213), *Globe Liquor* (see 332 U.S. at 572), and *Johnson* (see 344 U.S. at 54) all filed timely motions for new trial in the district court after the juries in those cases rendered their verdicts. Contrary to respondent's suggestion (see 04-819 Cond. Cross-Pet. at 18 & n.11), it was those post-verdict motions, not the Rule 50(a) motions for directed verdicts previously filed by the same litigants, that preserved those parties' rights to argue in the courts of appeals that new trials should be granted.

the issue of antitrust liability under Rule 59. See 125 S. Ct. at 1397. There is no reason to give litigants a right to relief in the appellate courts that they never sought in the district court. Such a scheme can be reconciled with the holdings of *Johnson*, *Globe Liquor*, and *Cone*, but not with either their logic or common sense.

2. *This Court's prior decisions construing Rule 50(b) are entitled to strong* stare decisis *effect and should not be abandoned*

In its conditional cross-petition for a writ of certiorari, respondent has contended—contrary to the square holdings of this Court (see p. 20, *supra*)—that a litigant who has filed a pre-verdict motion under Federal Rule of Civil Procedure 50(a) need not file a Rule 50(b) motion in order "to preserve [its] full range of rights on appeal," including the right to an appellate order directing judgment in the litigant's favor if the court of appeals finds the trial evidence insufficient to support the jury's verdict. 04-819 Cond. Cross-Pet. at 14; see *id.* at 14-18. Because the Court has denied the conditional cross-petition, see 125 S. Ct. 1399 (2005), it is doubtful that respondent's request for a remedy more favorable than the one it received from the Federal Circuit is properly before this Court. Cf. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985) (although "[a] prevailing party may advance any ground in support of a judgment in his favor," an "argument that would modify the judgment * * * cannot be presented unless a cross-petition has been filed"). In any event, respondent's argument lacks merit.

a. "Respect for precedent is strongest 'in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.'" *Hubbard* v. *United States*, 514 U.S. 695, 711-712 (1995) (quoting *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977)); accord, *e.g.*, *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 792 (1998); *Hilton* v. *South Carolina Public Rys. Comm'n*, 502 U.S. 197, 203 (1991); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989). That principle is applicable here *a fortiori*. Although Federal Rule of Civil Procedure 50(b) is not a statute, it is subject to revision not only by Congress, see, *e.g.*, *Henderson* v. *United States*, 517 U.S. 654, 668 (1996); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1941), but also by this Court pursuant to the Rules Enabling Act, see 28 U.S.C. 2072, 2074.

Indeed, repudiation at this late date of the Court's precedents construing Rule 50(b) would be especially unwarranted in light of this Court's statutory authority to amend the Federal Rules of Civil Procedure, and the limitations placed by Congress upon the exercise of that power. The Rules Enabling Act vests this Court with "the power to prescribe general rules of practice and procedure * * * for cases in the United States district courts." 28 U.S.C. 2072(a). The Act thus provides a mechanism by which this Court can amend Rule 50(b), without the need for congressional action, if the Court agrees with respondent's contention that no useful purpose is served by requiring a post-verdict motion for judgment as a matter of law as a prerequisite to appellate review of sufficiency challenges.

In exercising its authority under the Rules Enabling Act, however, the Court is required to "transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule." 28 U.S.C. 2074(a). The new or amended Rule "shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law." *Ibid.* That statutory procedure affords litigants and other interested persons notice of proposed changes to the Federal Rules, and it provides Congress a meaningful opportunity to reject a proposed Rule before its effective date. See, *e.g.*, *Sibbach*, 312 U.S. at 15. By contrast, a deci-

sion in this case that overruled established precedents and announced a new understanding of Rule 50(b) would have retroactive consequences, thereby frustrating the legitimate expectations of litigants in this and other cases, and it would undermine Congress's ability to perform the oversight role that the Rules Enabling Act contemplates.[13]

b. Respondent briefly acknowledges this Court's prior holdings in *Cone*, *Globe Liquor*, and *Johnson*, but it contends that "[t]he views expressed in those cases were not * * * included in the current Rule 50, when it was completely rewritten and adopted by this Court in 1963." 04-819 Cond. Cross-Pet. at 18 n.11. That argument reflects a fundamental misunderstanding of the 1963 amendments to Federal Rule of Civil Procedure 50. Insofar as the 1963 amendments added new subsections (c) and (d), those amendments did effect substantial changes to the Rule. Nothing in subsections (c) and (d) addresses the question presented here, however, and the minor, technical alterations made to Rule 50(b) in 1963 cannot plausibly be read to supersede the Court's prior holdings that a post-verdict motion under that Rule is a prerequisite to an appellate order directing entry of judgment in the verdict loser's favor. See *Amendments to Rules of Civil Procedure for the United States District Courts*, 31 F.R.D. 587, 643-644 (1963) (*1963 Amendments*) (redlined document showing changes to Rule 50(b)).

---

[13] Indeed, with respect to the precise question at issue here, the Court in *Johnson* explained that

> Rule 50(b) as written and as construed by us is not difficult to understand or to observe. * * * In 1946 this Court was asked to adopt an amendment to the rule which would have given appellate courts power to enter judgments for parties who * * * had made no timely motion for judgment notwithstanding the verdict. We did not adopt the amendment then. No sufficiently persuasive reasons are presented why we should do so now under the guise of interpretation.

344 U.S. at 53-54 (citation omitted).

The Advisory Committee Note accompanying the 1963 amendments to Federal Rule of Civil Procedure 50 cited this Court's decisions in (*inter alia*) *Cone*, *Globe Liquor*, and *Johnson*, and stated that "[t]he amendments do not alter the effects of a jury verdict or the scope of appellate review." *1963 Amendments*, 31 F.R.D. at 645. In 1967, the Court in *Neely* cited the same precedents and noted the 1963 Advisory Committee's stated intent not to alter the scope of appellate review "as articulated in the prior decisions of this Court." 386 U.S. at 324. The Court in *Neely* explained that "[t]he opinions in the [earlier] cases make it clear that an appellate court may not order judgment *n.o.v.* where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b)." *Id.* at 325. In light of that discussion, it is wholly implausible to suppose that the 1963 amendments to Rule 50, which had been adopted by the Court itself only four years before the decision in *Neely*, were intended to supersede the Court's earlier rulings by vesting the courts of appeals with the authority to direct entry of judgment in the absence of a timely Rule 50(b) motion.

c. Federal Rule of Civil Procedure 50 has been amended on four additional occasions since 1963. See Fed. R. Civ. P. 50 note, 28 U.S.C. App. at 778-779 (reproducing Advisory Committee Notes accompanying amendments adopted in 1987, 1991, 1993, and 1995). Neither the textual changes effected by those amendments, nor the relevant Advisory Committee Notes, suggest dissatisfaction with the rule that a court of appeals may not direct entry of a judgment contrary to the jury's verdict unless a timely Rule 50(b) motion was filed.

This Court is "especially reluctant to reject th[e] presumption [of adherence to *stare decisis* on questions of statutory interpretation] in an area that has seen careful, intense, and sustained congressional attention." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).

That reluctance is based in part on the fact that Congress, when it amends some features of the United States Code while leaving adjacent provisions intact, "must be presumed to have been fully cognizant of" this Court's construction of the pre-existing statutory scheme. *Id.* at 420; see *id.* at 420 n.26 (citing cases). Under those circumstances, Congress's failure to amend a statutory provision that has been definitively construed by this Court suggests approval of the Court's interpretation. See *Faragher*, 524 U.S. at 804 n.4. It is all the more reasonable to assume that this Court is familiar with its *own* prior decisions when it promulgates amendments to the Federal Rules of Civil Procedure, and that its failure to amend a Rule that has been given an authoritative construction implies satisfaction with existing law and practice.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

MARLEIGH DOVER
AUGUST FLENTJE
Attorneys

MAY 2005

Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

(2)

No. 04-597

IN THE

Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT ECKRICH, INC. d/b/a
CONAGRA REFRIGERATED FOODS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

BURCK BAILEY*
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102-8820
(405) 232-0621

Attorneys for Petitioner

ROBERT A. SCHROEDER*
BINGHAM MCCUTCHEN LLP
355 S. Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
(213) 680-6400

Attorneys for Respondent

* *Counsel of Record*

PETITION FOR CERTIORARI FILED NOVEMBER 2, 2004
CERTIORARI GRANTED FEBRUARY 28, 2005

TABLE OF CONTENTS

Page

Appendix A — Relevant Docket Entries Of The United States Court Of Appeals For The Federal Circuit 1a

Appendix B — Relevant Docket Entries Of The United States District Court For The Western District Of Oklahoma (Oklahoma City) 8a

Appendix C — Defendant's Motion For Directed Verdict Dated March 17, 2003 And Renewed Motion For Directed Verdict Dated March 19, 2003 (R. A5231-5238, 5884-5885) 15a

Appendix D — Jury Verdict Filed March 19, 2003 (R. A0096-0097) 23a

Appendix E — Jury Verdict – Second Stage Filed March 19, 2003 (R. A6475) 26a

Appendix F — Judgment Filed March 27, 2003 (R. A0001-0004) 27a

Appendix G — Stipulation For Judgment On Attorney Fees To Plaintiffs Filed April 9, 2003 (R. A0005) 31a

Appendix H — Judgment For Attorney Fee Filed April 9, 2003 (R. A0005.1) 33a

Contents

Page

Appendix I — Defendant Swift-Eckrich's Motion For Remittitur Reducing Damage Award On Antitrust Count, Or, In The Alternative, For New Trial On Antitrust Damages Filed April 10, 2003 (R. A6429-6443) 34a

Appendix J — Defendant's Motion To Amend Judgment Entered On April 9, 2003 Pursuant To Fed. R. Civ. P. 59(e) And To Set Amount Of Supersedeas Bond Filed April 23, 2003 (R. A6444-6457) 50a

Appendix K — Plaintiffs' Brief In Opposition To Defendant Swift-Eckrich's Motion For Remittitur Reducing Damage Award, Or, In The Alternative, For A New Trial Regarding Antitrust Damages Filed April 28, 2003 (R. A6458-6495) 58a

Appendix L — Reply Brief Of Defendant Swift-Eckrich, Inc. In Response To Plaintiffs' Opposition To Motion For Remittitur Reducing Damage Award Or For New Trial Filed May 7, 2003 ..... 75a

Appendix M — Plaintiffs' Brief In Opposition To Defendant's Motion To Amend Judgment Entered On April 9, 2003 Pursuant To Fed. R. Civ. P. 59(e) And To Set Amount Of Supersedeas Bond Filed May 12, 2003 (R. A6514-6524) 105a

Contents

Page

Appendix N — Order (Re Defendant's Motion To Amend Judgment Entered On April 9, 2003, Pursuant To Fed. R. Civ. P. 59(e) And To Set Amount Of Supersedeas Bond Filed May 23, 2003 (R. A6525-6528) 114a

Appendix O — Order (Denying Defendant Swift-Eckrich's Motion For Remittitur Reducing Damage Award On Antitrust Count, Or, In The Alternative For New Trial On Antitrust Damages) Filed June 4, 2003 (R. A6529-6531) 118a

Appendix P — Combined Petition For Panel Rehearing And Rehearing En Banc, Submitted By Plaintiffs-Appellees Unitherm Food Systems, Inc. And Jennie-O Foods, Inc. Filed July 26, 2004 ... 121a

Appendix Q — Excerpts From Conagra's Motion For Summary Judgment Filed February 11, 2002 (R. A0248-0252) 139a

Appendix R — Excerpts From Court's Order On Summary Judgment Motions Filed August 10, 2002 (R. A2693-2695) 144a

Appendix S — Excerpts From Conagra's Trial Brief Filed March 3, 2003 (R. A3092-3096) 147a

Appendix T — Excerpts From Trial Transcript Dated March 14, 2003 (R. A4699-4700) 153a

Appendix U — Federal Rule Of Civil Procedure 59 ..... 155a

Contents

Page

The following opinion, order and rule have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Opinion Of The United States Court Of Appeals For The Federal Circuit Decided July 12, 2004 ..... 1a

Order Of The United States Court Of Appeals For The Federal Circuit Denying Petition For Rehearing Dated And Filed September 14, 2004 ..... 55a

Federal Rule of Civil Procedure 50 ..... 57a

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASE SUMMARY
U.S. Court of Appeals for the Federal Circuit

Docket Number: 03-1472

LEAD CASE

Short Case Title (Name):	UNITHERM FOOD SYS V SWIFT-ECKRICH
Lower Court/ Agency:	DCT Division:WD/OK
Lower Court#:	01-CV-347
Notice of Appeal Received:	6/30/2003
Notice of Appeal Docketed:	7/2/2003
Certified List Filed:	7/2/2003
Notice of Appeal Filed:	6/20/2003
Fee Paid:	PD
Fee Amount:	$105.00
Receipt No:	

Appendix A

ATTORNEYS BY PARTY AS LISTED FOR THIS CASE

JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc. Plaintiff-Appellee	PRINCIPAL ATTORNEY BAILEY, BURCK Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed: 7/30/2003
JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc. Plaintiff-Appellee	OF COUNSEL ATTORNEY BROWN, DENNIS D. Firm: Fellers, Snider, Blankenship, Bailey & Tippens 321 South Boston, Suite 800 Tulsa, OK 74103-3318 (918)599-0621 - Tel; ext. (918)583-9659 - Fax EOA Filed: 7/30/2003
JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc. Plaintiff-Appellee	OF COUNSEL ATTORNEY CASTRO, GREG A. Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed: 7/30/2003

Appendix A

JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc. Plaintiff-Appellee	OF COUNSEL ATTORNEY WALTERS, JAY P. Firm: Fellers, Snider Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed:7/30/2003
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	PRINCIPAL ATTORNEY SCHROEDER, ROBERT A. Firm: Bingham McCutchen 355 South Grand Avenue, Suite 4400 Los Angeles, CA 90071-3106 (213)680-6400 - Tel; ext. (213)680-6499 - Fax EOA Filed:7/17/2003
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	OF COUNSEL ATTORNEY PASSARELLI, JOHN P. Firm: McGrath, North 1601 Dodge Street, Suite 3700 Omaha, NE 68102 (402)341-3070 - Tel; ext. (402)341-0216 - Fax EOA Filed:8/25/2003

Appendix A

SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	OF COUNSEL ATTORNEY LINDER, LEIGH OTSUKA Firm: Bingham McCutchen 355 South Grand Avenue, Suite 4400 Los Angeles, CA 90071-3106 (213)680-6400 - Tel; ext. (213)680-6499 - Fax EOA Filed:7/17/2003
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	OF COUNSEL ATTORNEY LEUNG, KEVIN K.T. Firm: Bingham McCutchen 355 South Grand Avenue, Suite 4400 Los Angeles, CA 90071-3106 (213)680-6400 - Tel; ext. (213)680-6499 - Fax EOA Filed:7/17/2003
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	OF COUNSEL ATTORNEY ROE, DAVID H. Firm: McGrath, North 1601 Dodge Street, Suite 3700 Omaha, NE 68102 (402)341-3070 - Tel; ext. ( ) - Fax EOA Filed:9/8/2003

Appendix A

UNITHERM FOOD SYSTEMS, INC. Plaintiff-Appellee	PRINCIPAL ATTORNEY BAILEY, BURCK Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed:7/30/2003
UNITHERM FOOD SYSTEMS, INC. Plaintiff-Appellee	OF COUNSEL ATTORNEY BROWN, DENNIS D. Firm: Fellers, Snider, Blankenship, Bailey & Tippens 321 South Boston, Suite 800 Tulsa, OK 74103-3318 (918)599-0621 - Tel; ext. (918)583-9659 - Fax EOA Filed:7/30/2003
UNITHERM FOOD SYSTEMS, INC. Plaintiff-Appellee	OF COUNSEL ATTORNEY CASTRO, GREG A. Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed:7/30/2003

Appendix A

UNITHERM FOOD SYSTEMS, INC. Plaintiff-Appellee	OF COUNSEL ATTORNEY WALTERS, JAY P. Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed:7/30/2003

ADDITIONAL PARTY INFORMATION

PARTY	ADDITIONAL INFO
JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc.	Plaintiff-Appellee
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods)	Defendant-Appellant
UNITHERM FOOD SYSTEMS, INC.	Plaintiff-Appellee

Appendix A

LISTING OF BRIEFS

* * *

12/8/2003	REPLY BRIEF OF APPELLANT. BY SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS (APPELLANT). SERVED BY MAIL ON 12/8/2003. FILED 12/8/2003. (NON-CONFIDENTIAL)
11/7/2003	BRIEF FOR PLAINTIFFS-APPELLEES UNITHERM FOOD SYSTEMS, INC. and JENNIE-O-FOODS, INC. BY UNITHERM FOOD SYSTEMS, INC. and JENNIE-O-FOODS, INC. (APPELLEES). SERVED BY MAIL ON 11/7/2003. FILED ON 11/7/2003. (NON-CONFIDENTIAL)
9/15/2003	BRIEF OF APPELLANT. BY SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) (APPELLANT). SERVED BY MAIL ON 9/15/2003. FILED ON 9/15/2003. (CONFIDENTIAL & NON-CONFIDENTIAL VERSIONS)

APPENDIX B— RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (OKLAHOMA CITY)

U.S. DISTRICT COURT
Western District of Oklahoma (Oklahoma City)

~~CIVIL~~ DOCKET FOR CASE #: 01-CV-347

Unitherm Food Sys, et al v. Swift-Eckrich Inc

Filed: 02/23/01
Assigned to: Honorable Robin J. Cauthron
Jury demand: Both
Demand: $75,000
Nature of Suit: 830
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:1338 Patent Infringement

UNITHERM FOOD SYSTEMS INC, an Illinois corporation	Greg A. Castro 405-232-9659 [COR LD NTC] Burck Bailey 405-232-9659 [COR LD NTC] Jay P. Walters 405-232-9659 [COR LD NTC] Fellers Snider Blankenship Bailey & Tippens-OKC 100 N Broadway Ave Suite 1700 Oklahoma City, OK 73102-8820 405-232-0621

Appendix B

	Dennis D. Brown 918-583-9659 [COR LD NTC] Fellers, Snider Blankenship Bailey & Tippens-OKC 321 S Boston Ave Suite 800 Tulsa, OK 74103-3318 918-599-0621
JENNIE-O FOODS INC., now known as Jennie-O Turkey Store, Inc., a Minnesota corporation plaintiff	Greg A Castro (See above) [COR LD NTC]

* * *

2/11/02	117	SEALED DOCUMENT: MOTION by defendant Swift-Eckrich Inc for summary judgment and brief in suppt (IN VAULT) (kew) [Entry date 02/12/02]

* * *

8/19/02	194	ORDER by Honorable Robin J. Cauthron; dft's mtn to strike is hereby denied; plas are granted partial sum jgm on their 3rd cause of action and their 6th and 7th affirmative defenses to dft's cntclm (Patent Invalidity and Unenforceability); plas are entitled to a jgm declaring the '027 patent invalid and unenforceable; dft is granted sum jgm on plas' 8th cause of

action (tortious interference with existing contractual and business relations); dft is also granted sum jgm on Jennie-O's antitrust claims; dft's mtn for sum jgm is denied on remaining causes of action, i.e. intentional interference with prospective economic relationships, actual or constructive fraud, violation of the Sherman Antitrust Act (Unitherm only); finally, this ruling moots the dft's mtn to strike Jennie-O's 2nd affirmative defense of non-infringement, or in the alternative, for partial sum jgm of infringement; a jgm will enter at the conclusion of these proceedings; [182-1]; [154-1], [147-1] [147-2] [117-1] (cc: all counsel) [EOD Date 8/19/02] (kew) [Entry date 08/19/02]

* * *

3/3/03 267 TRIAL briefs submitted by defendant Swift-Eckrich Inc (kew) [Entry date 03/04/03]

* * *

3/17/03 284 COURTROOM MINUTES: FURTHER JURY TRIAL; pla continues case in chief with testimony from David Howard, Russ Mangum and Jeffrey Kinrich; pla rests; dft's mtn for d.v. is denied; dft presents

case in chief with testimony from Chris Salm; ct adjourns to 9:30, 3/18/03 (kew) [Entry date 03/18/03]

* * *

3/19/03 287 COURTROOM MINUTES: FURTHER JURY TRIAL; dft continues case in chief with testimony from Alan G. Goedde, PhD; parties rest; dft renews mtn for d.v.; denied; closing arguments, court instructs the jury; bailiff sworn; jury retires to deliberate at 3:23; jury returns with verdict in favor of pla at 8:35 p.m.; jury is polled; jury is discharged; clerk to file judgment; cnsl granted additional 10 days to file post trial mtns; court exhibits 1 and 2 returned to pla cnsl; master exhibit list attached (kew) [Entry date 03/20/03]

* * *

3/19/03 292 VERDICT for plaintiff Unitherm Food Sys against defendant Swift-Eckrich Inc (kew) [Entry date 03/20/03]

* * *

3/19/03 295 SECOND STAGE VERDICT for plaintiff Unitherm Food Sys against defendant Swift-Eckrich Inc. (kew) [Entry date 03/20/03]

3/27/03	296	JUDGMENT IN A CIVIL CASE: by Honorable Robin J. Cauthron; terminating case (cc: all counsel) (kew) [Entry date 03/27/03]

* * *

4/9/03	298	STIPULATION for judgment on atty fees to plaintiffs in the sum of $1,022,445 (more fully set out) (kew) [Entry date 04/09/03]
4/9/03	299	JUDGMENT: by Honorable Robin J. Cauthron based upon the stipulation of the plaintiffs and dft and pursuant to USC 15 it is ordered adjudged and decreed that plas have and recover judgment against the dft in the amt of $1,022,445 as a reasonable atty fee [298-1] (cc: all counsel) (kew) [Entry date 04/09/03]

* * *

4/10/03	301	MOTION by defendant Swift-Eckrich Inc for remittur reducing damage award on antitrust count or, in the alternative, for new trial on antitrust damage (kew) [Entry date 04/11/03]
4/10/03	302	DECLARATION of Leigh O. Linder regarding motion for remittur reducing damage award on antitrust count [301-1],

regarding motion for new trial on antitrust damages [301-2] (kew) [Entry date 04/11/03]

* * *

4/23/03	304	MOTION by defendant Swift-Eckrich Inc to amend judgment entered on 4/9/03 and to set amount of supersedeas bond (kew) [Entry date 04/23/03]
4/28/03	305	RESPONSE by plaintiff Unitherm Food sys, plaintiff Jennie-O Foods Inc to motion for remittur reducing damage award on antitrust count [301-1], motion for new trial on antitrust damages [301-2] (kew) [Entry date 04/28/03]
5/7/03	308	REPLY by defendant Swift-Eckrich Inc to response to motion for remittur reducing damage award on antitrust count [301-1], motion for new trial on antitrust damages [301-1] (kew) [Entry date 05/08/03]
5/12/03	309	BRIEF IN OPPOSITION by plaintiff Unitherm Food Sys, plaintiff Jennie-O Foods Inc to motion to amend judgment entered on 4/9/03 and to set amount of supersedeas bond [304-1] (kew) [Entry date 05/13/03]

Appendix B

5/23/03	310	ORDER by Honorable Robin J. Cauthron granting in part and denying in part dft's motion to amend judgment entered on 4/9/03 and to set amount of supersedeas bond [304-1]; dft's req to amend the jgm is denied; the Ct sets the amt of the supersedeas bond at $19,022,445.00 (cc: all counsel) [EOD Date 5/23/03] (kew) [Entry date 05/23/03]
6/4/03	311	ORDER by Honorable Robin J. Cauthron; in the absence of any evidence demonstrating the verdict is the result of a manifest error of law, and considering that the jury's verdice can be reconciled with the evidence and the instructions, the Ct finds that Dft's motion for remittur reducing damage award on antitrust count [301-1], or, in the alternative, motion for new trial on antitrust damages [301-2] should be and is denied (cc: all counsel) [EOD Date 6/4/03] (kew) [Entry date 06/04/03

* * * *

APPENDIX C — DEFENDANT'S MOTION FOR DIRECTED VERDICT DATED MARCH 17, 2003 AND RENEWED MOTION FOR DIRECTED VERDICT DATED MARCH 19, 2003 (R. A5231-5238, 5884-5885)

[Commencing at page 1100]

* * *

MR. BAILEY: Plaintiffs rest, Your Honor.

THE COURT: Counsel, come to the bench.

(THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH, OUT OF THE HEARING OF THE JURY:)

MR. SCHROEDER: Do I have the floor?

THE COURT: Yes, you do.

MR. SCHROEDER: Your Honor, I would like to make a motion for directed verdict at this point with respect to each of the plaintiffs' claims. Would the Court like to hear anything further about that at this time?

THE COURT: No, not unless you think you've got something that you think will persuade me.

MR. SCHROEDER: Well, I do, yes.

THE COURT: On each one of the three?

MR. SCHROEDER: Well, certainly, most definitely on the fraud claim that I would like to argue the others as well.

[1101] THE COURT: Okay. I'll let the jury go on their break and we'll have a five-minutes or less of argument.

MR. SCHROEDER: If the Court tells me how much time, I'll stay within it.

THE COURT: All right.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, WITHIN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: Members of the jury, I'm going to send you on your break. It will be a little longer this time because we have some things to take care of at this point in the trial. I will instruct you not to discuss the case among yourselves or with anyone else. Please be back in the jury assembly room at 15 till. We'll call for you at that time.

(THE JURY WAS EXCUSED FROM THE COURTROOM, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: Mr. Schroeder.

MR. SCHROEDER: Your Honor, the defense moves for a directed verdict with respect to each of the causes of action. And primarily I'd like to discuss, within the limited time available at this point, the fraud cause of action, and I urge that that be dismissed because Your Honor may recall that we earlier moved for a summary judgment as to that claim and the plaintiff opposed that motion on the basis that there was a fraud in the sense of a promise to consider the oven, the purchase of the oven, which had not been fulfilled, and therein [1102] lied the heart of the fraud. I think it would follow from that that the plaintiff did not make its claim until 2001, even though this fraud supposedly first occurred in 1995 or '6 because it was only when the patent issued that they were able to see the motivation of the plaintiff. So it was in that way that they kind of dodged a bullet and avoided summary judgment and I think they subsequently are estopped from asserting some other fraud. I think it's also pertinent here that fraud must be pleaded with particularity.

Pursuant to the plaintiffs' position, and with the plaintiffs' acquiescence, an instruction was given to the jury at the beginning of this case that was consistent with the plaintiffs' position on fraud. The plaintiff then waited until the principal witness in this regard, Arni Mickelberg, had left the jurisdiction and then changed its fraud claim and then asserted that instead of the fraud being based on a breach of contract to consider the purchase of the oven, the plaintiff asserted that there was a different agreement, that ConAgra would in fact buy the oven if certain criteria were met.

Now, it seems to me that they can't change their fraud claim that way after the witness is gone. And they can't

change their fraud claim to one which is different from the fraud claim that they asserted to escape from summary judgment earlier in the case.

And another problem here is that if they are to be allowed [1103] to amend their fraud claim, to assert a different fraud claim, then the defendant must be allowed to assert the defense of the statute of limitations, and the change in the plaintiffs' fraud claim does give rise to a statute of limitations defense, and this is the reason: They could have argued that if the fraud had been as they originally contended, a promise made to consider the purchase of an oven, then there would be some logic, I suppose, on the basis of which that the jury could conclude that it was only when the patent issued that they realized that the subjective judgment not to buy the oven was made not in good faith. But if they change that and say there was an obligation to buy the oven, well, then they knew in 1996 that the oven had not been purchased, they didn't have to wait for the patent to issue and they should have made their claim then but instead they made it in 2001 and the two-year statute of limitations had long since passed. So, for all of those reasons, I don't think that this fraud claim can stand.

I would also point out that we can, if we have more time, show the Court that Mr. Mickelberg flatly denied that there was any commitment to buy the oven under any circumstances.

THE COURT: Let me stop you here --

MR. SCHROEDER: Sure.

THE COURT: -- and ask Mr. Castro or Mr. Bailey, what is your fraud claim?

- MR. CASTRO: Well, Your Honor, it's an ongoing fraud [1104] from 1993 on up through 2000, 2001 when Mr. Howard knew and learned about the entire patent and the entire conduct of Swift-Eckrich in taking his ideas and learning about his process and how everything worked and filing a patent on it and then sending letters out to the market to destroy his business. Your Honor, the fraud is throughout this time period.

THE COURT: You can't have it throughout. You have to have pled and gotten past summary judgment on a claim for fraud.

MR. CASTRO: And we did plead, Your Honor, the very claim that we've alleged, and they have never raised the statute of limitations. It's not in their answer, it's not in the pretrial order, and I think we've been consistent in our contention of when that fraud occurred.

THE COURT: Do you persist in the contention that the fraud you claim can be defined as the defendant's considering purchase of the equipment during that '95/'96 demonstration period with no intent to ever purchase the equipment?

MR. CASTRO: Yes.

THE COURT: Is that what you contend the fraud is?

MR. CASTRO: Yes.

THE COURT: Regardless of what the proof may have been at this trial?

MR. CASTRO: Yes.

THE COURT: I think you're limited to that. That's [1105] what's been pled and that's what's been argued. I am willing to include something in the fraud instruction that limits the fraud that the jury can find. They can't just find that defendant did you wrong. It has to be tied to what's been pled in this case.

I understand that won't satisfy you completely, Mr. Schroeder, but I think there is evidence of the fraud that's been pled and discussed throughout this case. There is evidence of other bad acts that I suspect the plaintiff in closing argument will attempt to persuade the jury is fraud, and that's what my instruction will be designed to prevent.

MR. SCHROEDER: Your Honor, my view of that is that to prove fraud the plaintiff must prove a false statement to Unitherm on which Unitherm relied. Now, they might prove other things in addition to that but they have to have that. If they don't have that, the elements of fraud are not present.

Now, Mr. Castro is saying the fraud was pretending that they would buy the oven -- that they would consider the purchase of the oven, but when Mr. Howard was on the witness stand, he conceded that ConAgra did consider the purchase of the oven. He didn't dispute that. That, of course, was the testimony of Mr. Mickelberg. There's no other witness on the subject. So --

THE COURT: I think when viewed in the light most favorable to the plaintiff, there is evidence from which the [1106] jury could conclude that the fraud pled did occur, and I will overrule your motion subject to the giving of a limited instruction as I have described.

MR. SCHROEDER: Your Honor, may I just very briefly mens the other basis for the motion?

THE COURT: Yes.

MR. SCHROEDER: That is, the other two causes of action are both dependent upon the plaintiff proving by clear and convincing evidence that there was an intent to deceive the patent office. Well, now the plaintiff is now in, or plaintiffs' case is now in, and I realize that intent can be inferred but it has to be inferred from something and I don't believe there's evidence here that would permit that inference.

THE COURT: Again, viewing the evidence in the light most favorable to the plaintiff, I think there is such evidence and I will overrule your motion on those grounds as well.

MR. SCHROEDER: Finally, Your Honor, I would again like to raise the Crystal Gas problem, that I do not believe they have put in sufficient evidence to permit an award of damages with respect to intentional interference with prospective economic advantage or they haven't proven specific customers and specific orders as required by that case.

Appendix C

THE COURT: And I believe they have, and I'm also satisfied they have shown sufficient evidence that sister or subsidiary companies were interfered with and that their [1107] relations can be used to determine that cause of action as well as companies foreign to the defendant or not connected to the defendant.

MR. SCHROEDER: Thank you, Your Honor.

* * *

[1461]

* * *

MR. SCHROEDER: Yes, Your Honor, if I may. For the record, Your Honor, I would like to make a motion on behalf of the defendant for directed verdict for each of the three causes of action that the plaintiffs have brought. Would the Court like to hear further on that point now?

THE COURT: Is it on the same basis you argued earlier?

MR. SCHROEDER: Essentially, Yes, Your Honor.

THE COURT: I will overrule those motions for the same reasons I gave earlier.

* * *

APPENDIX D — JURY VERDICT FILED MARCH 19, 2003 (R. A0096-0097)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., an Illinois corporation; and JENNIE-O FOODS, INC., a Minnesota Corporation,

Plaintiffs

vs.

SWIFT-EKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant

Verdict Form

We the jury, being duly sworn upon our oaths, find as follows:

I. On the claim of attempted monopolization:

X For Plaintiff Unitherm Food Systems Inc.

—OR—

__ For Defendant Swift-Ekrich, Inc., d/b/a/ Conagra Refrigerated Foods.

If you found for Plaintiff, what is the dollar amount of Plaintiff's damages $6,000,000.

Appendix D

II. On the claim of intentional interference with prospective business advantage:

X For Plaintiff Unitherm Food Systems Inc.

—OR—

__ For Defendant Swift-Eckrich, Inc., d/b/a Conagra Refrigerated Foods.

If you found for Plaintiff, what is the dollar amount of Plaintiff's damages $2,000,000.

III. On the claim of fraud on Unitherm:

__ For Plaintiff Unitherm Food Systems Inc.

—OR—

X For Defendant Swift-Ekrich, Inc., d/b/a Conagra Refrigerated Foods.

If you found for Plaintiff, what is the dollar amount of Plaintiff's damages $_____.

If you found for Plaintiff on its claim for intentional interference or its claim for fraud, please answer the following:

We do X do not __ (Check One) find by clear and convincing evidence that Defendant, acted in reckless disregard of the rights of others.

Appendix D

—OR—

We do __ do not __ (Check One) find by clear and convincing evidence that Defendant, acted in intentionally and with malice towards others.

March 19, 2003
Date

s/ Louis Furmanski
Presiding Juror

APPENDIX E — JURY VERDICT – SECOND STAGE FILED MARCH 19, 2003 (R. A6475)

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., an Illinois corporation; and JENNIE-O FOODS, INC., a Minnesota Corporation,

Plaintiffs,

vs.

SWIFT-ECKRICH, INC., d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

Verdict Form – Second Stage

We the jury, being duly sworn upon our oaths, find in favor of Plaintiff, Unitherm Food Systems, Inc., and fix the dollar amount of punitive damages in the sum of $2,000,000.

March 19, 2003
Date

s/ Louis Furmanski
Presiding Juror

APPENDIX F — JUDGMENT FILED MARCH 27, 2003 (R. A0001-0004)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., and JENNIE-O FOODS, INC., now known as JENNIE-O TURKEY STORE, INC.,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS,

Defendant.

JUDGMENT

This action came on for trial before the court and a jury, Honorable Robin J. Cauthron, Chief Judge of the United States District Court, presiding. The issues having been duly tried and the jury has duly rendered its verdict. In accordance with the jury's March 19, 2003 verdict,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Unitherm Food Systems, Inc. ("Plaintiff") shall have

Appendix F

and recover on its claims against Defendant Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Foods ("Defendant"), as follows:

On Plaintiff's claim for attempted monopolization in violation of § 2 of the Sherman Act, trebled pursuant to 15 U.S.C. § 15, the sum of Eighteen Million and No/100 Dollars ($18,000,000.00);

On Plaintiff's claim for tortious interference with prospective economic advantage, the sum of Two Million and No/100 Dollars ($2,000,000.00);

On Plaintiff's claim for exemplary damages the sum of Two Million and No/100 Dollars ($2,000,000.00);

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff shall have and recover judgment against the Defendant in the amount of Eighteen Million and No/100 Dollars ($18,000,000.00) and post-judgment interest thereon at the rate provided by law, a reasonable attorney fee and the costs of this action.

Entered this 27th day of March, 2003.

s/ Robin J. Cauthron
Robin J. Cauthron
United States Chief District Judge

Appendix F

AGREED TO:

s/ Burck Bailey
Greg A. Castro
Jay P. Walters
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820
Telephone: (405) 232-0621
Facsimile: (405) 232-9659

-and-

Dennis D. Brown
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
321 South Boston, Suite 800
Tulsa, OK 74103-3318
Telephone: (918) 599-0621
Facsimile: (918) 583-9659

Counsel for Plaintiff, Unitherm Food Systems, Inc.

s/ Keith D. Tracy
Robert D. Tomlinson
Keith D. Tracy
MCKINNEY & STRINGER
Corporate Tower
101 North Robinson Ave., Suite 1300
Oklahoma City, OK 73102-5504
Telephone: (405) 239-6444
Facsimile: (405) 239-7902

Appendix F

Robert A. Schroeder
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
Telephone: (213) 680-6400
Facsimile: (213) 680-6499

Howard A. Kroll
Leigh O. Linder
CHRISTIE, PARKER & HALE
350 W. Colorado Boulevard
Pasadena, CA 91105
Telephone: (626) 795-9900
Facsimile: (616) 577-8800

John P. Passarelli
David H. Roe
MCGRATH, NORTH, MULLIN
& KRATZ
222 South Fifteenth Street, Suite 1400
Omaha, NE 68102
Telephone: (402) 341-3070
Facsimile: (402) 341-0216

Counsel for Defendant,
Swift-Eckrich, Inc. d/b/a ConAgra
Refrigerated Foods

APPENDIX G — STIPULATION FOR JUDGMENT ON ATTORNEY FEES TO PLAINTIFFS FILED APRIL 9, 2003 (R. A0005)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., an Illinois corporation; and JENNIE-O FOODS, INC. a Minnesota corporation,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

STIPULATION FOR JUDGMENT ON ATTORNEY FEES TO PLAINTIFFS

Plaintiffs and Defendant hereby stipulate and agree that judgment in the sum of $1,022,445 may be entered in favor of Plaintiffs and against Defendant as a reasonable attorney fee pursuant to 15 U.S.C. § 15. This Stipulation is without prejudice to the issue of whether or not Plaintiffs are entitled to an attorney fee award in the event the United States Courts of Appeals for the Federal Circuit reverses, modifies or remands the judgment of March 27, 2003.

Appendix G

s/ Greg A. Castro
Burck Bailey
Greg A. Castro
Jay P. Walters
Fellers, Snider, Blankenship,
Bailey & Tippens
100 North Broadway,
Suite 1700
Oklahoma City, OK
73102-8820

and

Dennis D. Brown
Fellers, Snider, Blankenship,
Bailey & Tippens
321 South Boston,
Suite 800
Tulsa, OK 74103-3318

Attorneys for Plaintiffs

s/ Robert D. Tomlinson
Robert D. Tomlinson
Keith D. Tracy
McKinney & Stringer
101 North Robinson Ave.,
Suite 1300
Oklahoma City, OK
73102-5504

Robert A. Schroeder
Leigh O. Linder
Bingham McCutchen LLP
355 South Grand Avenue,
Suite 4400
Los Angeles, CA 90071-3106

Howard A. Kroll
Christie, Parker & Hale
350 W. Colorado Boulevard
Pasadena, CA 91105

APPENDIX H — JUDGMENT FOR ATTORNEY FEE FILED APRIL 9, 2003 (R. A0005.1)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CI V-01-347-C

UNITHERM FOOD SYSTEMS, INC., an Illinois corporation; and JENNIE-O FOODS, INC., a Minnesota corporation,

Plaintiffs,

v.

SWIFT-ECKRICH, INC., d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

JUDGMENT

Based upon the Stipulation of the Plaintiffs and Defendant, and pursuant to U.S.C. § 15, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs have and recover judgment against the Defendant in the amount of $1,022,445 as a reasonable attorney fee.

Entered this 9 day of April 2003.

s/ Robin J. Cauthron
Robin J. Cauthron
United States District Judge

APPENDIX I — DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD ON ANTITRUST COUNT, OR, IN THE ALTERNATIVE, FOR NEW TRIAL ON ANTITRUST DAMAGES FILED APRIL 10, 2003 (R. A6429-6443)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Case No. CIV 01-347-C

UNITHERM FOOD SERVICES, INC., an Illinois corporation; and JENNIE-O-FOODS, INC., a Minnesota corporation,

Plaintiffs,

vs.

SWIFT-ECKRICH, INC. d.b.a. CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendants.

DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD ON ANTITRUST COUNT, OR, IN THE ALTERNATIVE, FOR NEW TRIAL ON ANTITRUST DAMAGES

Appendix I

[Table of Contents and Authorities Intentionally Omitted]

Pursuant to Fed.R.Civ.P. 59(e), Defendant Swift-Eckrich, Inc. ("Swift-Eckrich") respectfully requests that the Court order a remittitur reducing the antitrust damages award from $18 million to $6 million and amend the judgment accordingly. A proposed amended judgment is lodged concurrently with this motion. If Plaintiff Unitherm Food Systems, Inc. ("Unitherm") refuses to accept the remittitur, the Court should order a new trial on the issue of antitrust damages pursuant to Fed.R.Civ.P. 59(a).

The grounds for the motion are that the jury found that the actual damages to Plaintiff Unitherm with respect to the claim for intentional interference with prospective economic advantage were $2 million. Based on the identical evidence and arguments, which made no distinction between the two causes of action, the same jury found that the antitrust damages were $6 million. Obviously, the jury has trebled the damages. They should not be trebled again.

Appendix 1

BRIEF IN SUPPORT OF DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD ON ANTITRUST COUNT, OR, IN THE ALTERNATIVE, FOR NEW TRIAL ON ANTITRUST DAMAGES

I. INTRODUCTION

Unitherm's claims for intentional interference and antitrust violations were both premised on contentions that Swift-Eckrich obtained the '027 patent through fraud on the Patent & Trademark Office, and that by asserting the patent, Swift-Eckrich caused Unitherm to lose profits on the sale of its browning equipment. Accordingly, the same evidence and even the same argument before the jury supported Unitherm's claim for damages under the respective legal theories. Unitherm did not offer any evidentiary basis for concluding that the compensatory damages under one theory were different from those under the other. Thus, Unitherm's lost profits are Unitherm's lost profits, regardless of the underlying theory as to why Defendant's conduct was unlawful.

The jury, however, awarded ***$2 million*** as compensatory damages on the intentional interference claim, but awarded exactly three times as much, ***$6 million***, on the antitrust claim It is, therefore, clear that the jury improperly trebled the antitrust damages before submitting its verdict to the Court. ($2 million x 3 = $6 million.) Because the Court then trebled that amount again[1] ($6 million x 3 = $18 million), the

[1] Title 15, U.S.C. § 15 provides, in pertinent part, that "any person who shall be injured in his business or property by reason of (Cont'd)

Appendix 1

judgment is excessive and should not stand. The Court should, therefore, order a remittitur and reduce the judgment amount accordingly. If Unitherm is unwilling to accept a remittitur, a new trial should be granted on the issue of the amount of antitrust damages to resolve the inconsistency between the antitrust and intentional interference awards.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Unitherm's Evidence In Support Of Its Purported Antitrust And Intentional Interference Damages.

At trial, Unitherm relied almost exclusively on an expert witness, Jeffrey Kinrich, to prove damages in the form of lost profits. (That testimony is attached as Exh. 1.) He testified as to the profits that Unitherm would have made on additional browning equipment sales from 1998 forward but for Swift-Eckrich's conduct. (Exh. 1.) Mr. Kinrich did not calculate antitrust damages separately from intentional interference damages. He simply relied upon an assumption that the acts of Swift-Eckrich caused a decline in Unitherm's sales and resulting loss of profits without assigning any legal theory as to why those acts were wrong. (Exh. 1, R.T. 4:13-10:21.) Indeed, he used a single set of demonstrative charts to show Unitherm's sales trends and his projections of lost profits on browning lines from 1998 forward. He offered only one analysis that applied to both claims.

(Cont'd)
anything forbidden in the antitrust laws . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained . . . ."

Q. Were you able to come up with a damage analysis of how you believe, if at all, Unitherm **suffered damage as a result of the conduct of ConAgra**?

A. Yes.

(Exh. 1 RT., 8:13-25.)

Q. To come up with lost profits, Mr. Kinrich, what did you do – what did your analysis consist of in this case?

A. Well, in doing lost profits as a measure of damages, the basic concept is to start with what you know, start with what actually happened and if you look at this chart that's in front of you that's the second line which says "Actual Browning Line Sales."

So first I went to find out what actually happened. Then I want to figure out what would have happened if there had not been the acts at issue, . . . if Swift Eckrich had not attempted to keep Unitherm from selling the browning lines. So I did a projection and we'll talk about that.

Obviously, if you look at the chart, projected minus actual is the amount of lost sales, but lost sales are not lost profits and damages, are not equal to sales, they're equal to profits. **So I then had to figure out what profits Unitherm would**

make on those additional lost sales and that's what I call the incremental profit margin, which is a percentage, and we'll talk a little bit about how I did that later.

(Exh. 1, R.T., 8:13-25, emphasis added.)

On cross-examination, Mr. Kinrich confirmed that his singular damage analysis was based on an assumption that ". . . the jury will find something to be – result in liability . . ." (Exh. 1, R.T. 24:25-25:25) He thus offered an opinion only as to the "financial impacts" of Swift-Eckrich's conduct, assuming that conduct to have been wrongful by some undefined legal standard.

None of Unitherm's other witnesses even suggested that Unitherm suffered different or greater lost profits from antitrust violations as compared to acts of intentional interference. Not one shred of evidence was offered that would enable the jury to reach different damage conclusions as to the two claims.

Indeed, Swift-Eckrich objected to this presentation of the same damage evidence as to Unitherm's two claims, arguing that the intentional interference claim, unlike the antitrust claim, required proof of damage on a customer by customer and order-by-order basis. Unitherm did not, however, present any such evidence that was identified as being specific to the intentional interference claim.

B. The Court's Instructions On Damages.

The jury was instructed that if Swift-Eckrich were found liable for intentional interference, Plaintiff could recover "any damages that are a natural and probable consequence of that interference. These damages are measured by the amount of money that will compensate Plaintiff for the loss of the economic relationship." (Exh. 3.) Further, if Swift-Eckrich were found liable for antitrust violations, the Plaintiff should "be fairly compensated for all damages, if any, to Plaintiffs business or property that were primarily caused by the conduct of Plaintiff." These damages "***should include any damages suffered by Plaintiff because of lost profits***; that is to say, profits that Plaintiff would have made, but for the unlawful conduct of Defendant." (Exh. 4, emphasis added.) These instructions, especially when viewed in the light of the evidence in this case, provide no basis for differing damage awards. Lost profits is the measure in both instances.

As to trebling, Swift-Eckrich requested an instruction that the jury limit its award to ***actual damages*** suffered by Unitherm for antitrust violations, and that it should not concern itself with the final judgment amount:

> If you find for Unitherm in accordance with these instructions, it then becomes your responsibility to determine the actual damages that Unitherm has suffered by reason of the violations of the antitrust laws. Your concern is only with determining the actual damages. You are not to concern yourself with the judgment to be entered by the Court in this case.

(Exh. 2.[2]) The Court declined to give this instruction.

C. The Verdict Form.

Counsel for the parties met at length with the Court and with one another regarding the verdict form. By stipulation, the parties agreed that damages for antitrust violations and intentional interference would be duplicative, as both sought Unitherm's lost profit for browning equipment sales that were not made from 1998 forward. The parties thus stipulated that if the jury were to find liability under both theories, Unitherm would be entitled to an award of damages on only one of the theories. (Linder Decl. ¶ 9.)

D. Argument Of Counsel.

In arguing the case to the jury, neither side suggested that different damage awards were appropriate for the intentional interference and antitrust causes of action.

E. The Verdict.

The jury found liability on both the antitrust and intentional interference claims. (Exh. 4.) It found that the

---

[2] *See* 3 O'Malley, et al., Federal Jury Practice & instructions § 150.93 (2001). In accordance with Tenth Circuit law, the instruction did not mention the trebling of the award. *Semke v. Enid Auto. Dealer's Assn*, 456 F.2d 1361, 1370 (10th Cir. 1972) (jury should not be told about the trebling of damage award).

compensatory damages on the intentional interference count were $2 million, but awarded $6 million on the antitrust count. The obvious conclusion is that the jury found the compensatory damages to be $2 million (to which it later added another $2 million in punitive damages) and trebled the compensatory damages to award $6 million on the antitrust claim. Indeed, it would be unrealistic to pretend that the jury did not know that antitrust damages are to be trebled. The foreman of the jury was the chairman of a university Political Science department.

III. THE $18 MILLION AWARD RESULTED FROM A MANIFEST ERROR OF LAW AND SHOULD BE REDUCED.

A. The Court Has The Power To Correct A Manifest Error.

A judgment may be altered or amended pursuant to a motion under Fed. R. Civ. P. 59(e)[3] when it is "necessary to correct manifest errors of law." *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996), citing Wright, et al., *Federal Practice and Procedure: Civil 2d*, § 2810.1, at 124-25 (1995).

A jury's award of damages that is not allowed by law or is not supported by the evidence constitutes such a manifest error of law. *See Guides, Ltd. v Yarmouth Group Property Mgt., Inc.*, 295 F.3d 1065, 1076-77 (10th Cir. 2002) (evidence

[3] Fed. R Civ. P. 59 (e) provides: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

did not support award of damages above plaintiff's lost profits; thus, jury's damage award was reduced from $150,000 to no more than $75,000); *see, Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1167, 1178 (10th Cir. 1981) (affirming reduction of an "excessive" punitive damages award from $3 million to $1 million). In *Brown v. Presbyterian Healthcare Servs.*, the jury awarded $187,000 to plaintiff on her antitrust claim ($112,000 in compensatory damages and $75,000 in punitive damages). After entry of judgment, the district court granted defendant's motion under Fed. R Civ. P. 59(e) to vacate the award of punitive damages, and entered an amended judgment reducing the award to $112,000. The Tenth Circuit affirmed, reasoning that punitive damages were not allowed by the statute and would duplicate the enhancement already provided in the trebling provision. Thus, "the district court's decision to vacate the award of punitive damages served to correct a manifest error of law and did not prejudice [the plaintiff.]" *Id.* at 1332. Where a reduction of a jury verdict is appropriate, the court may order a remittitur to eliminate any improper award from the judgment. *Malandris v. Merrill Lynch*, 703 F.2d at 1178 (remittitur is a "widely accepted remedy").

B. The Antitrust Award Contains A Manifest Error Of Law Because The Jury Improperly Trebled The Amount Of Antitrust Damages.

Where a plaintiff tries its a case based upon a single set of facts demonstrating a single injury for which the jury could find liability under alternative theories, "lopsided" or inconsistent damages awards have been found to demonstrate

that the jury calculated the award by improper means or by misapplying the law. For example, in *Video Int'l Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1085 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989), all of plaintiffs claims (for civil rights violations, contractual interference, and antitrust violations) were premised upon the same evidence that its business was harmed by defendant-city's application of zoning laws. The jury found defendant liable on all three theories but awarded damages as follows:

Civil Rights:

Compensatory	$200,000
Punitive	$2.5 million

Contractual Interference:

Compensatory	$1.245 million
Punitive	$500,000

Antitrust: $0

The trial court granted JMOL on the civil rights and intentional interference claims, leaving only the antitrust claim. On appeal, plaintiff argued that it was entitled to a new trial on the issue of antitrust damages. The Fifth Circuit Court of Appeals agreed and remanded, reasoning that the plaintiff

> tried this case as one set of facts demonstrating a single injury for which the jury could find liability under any one or all of three theories. . . . ***The case was not presented, tried, or argued as one in which discrete damages had been suffered under, each claim. Although liability arguments under each theory may have been advanced on different parts of the evidence, it seems dear that damages under each theory rested on identical facts, that is the loss of business and customers*** because of the [defendant's] application of its zoning laws as reflected by [plaintiff's] loss in revenues and value between the first and second contracts of sale [of assets to a third party].

Id. at 1085-86, emphasis added. "Thus, ***one would expect the jury's respective damages awards to be virtually the same"*** *Id.* at 1086, emphasis added. In the Court's view, the "lopsided verdict" persuaded the Court that the jury had improperly set the awards by "decid[ing] the total amount it wished to award and apportion[ing] it among the theories, rather than awarding duplicative damages on each separate theory in approximately the same amount." *Id.* at 1085. Because the Court could not determine why the jury awarded "***zero damages*** for antitrust violations and a ***major sum*** for contract interference ***when both theories are supported by the same set of facts***," it found that the plaintiff should have another chance to prove up its antitrust damages. *Id.* at 1086, emphasis added; *see also, Rosario v. Livaditis*, 963 F.2d 1013, 1020-21 (7th Cir. 1993), *cert. denied* 506 U.S. 1051 (1993) (where plaintiff's case was premised on a single set of facts, it was "conspicuously inconsistent" for jury to award

$600,000 for violation of the Consumer Fraud Act and zero damages for violation of RICO; new trial on damages was warranted).

In this case, as in *Video Int'l Production* and *Rosario,* Unitherm clearly proceeded on the basis that the measures of compensatory damages for antitrust violations and intentional interference were one and the same. Indeed, Unitherm's vigorous opposition to efforts by Swift-Eckrich to preclude Unitherm from relying on generalized evidence of lost sales (e.g., evidence of sales trends, as opposed to an individualized evidence of lost customers) as the basis of its intentional interference damages eliminated any difference that might have existed.[4]

None of Unitherm's other witnesses – economist Jeffrey Kinrich, executive David Howard, sales representative Ron Snider, or antitrust expert Russell Mangum – gave any testimony, nor did Unitherm offer a single document that would support a finding that Unitherm's antitrust damages were different from, much less three times the damages caused by intentional interference. In short, Plaintiffs did not provide the jury with any reason to award $4 million over and above the lost profits that it had determined to be $2 million. (Linder Decl., ¶ 3.)

[4] Swift-Eckrich made a motion in limine to preclude Unitherm from "relying on generalized evidence of lost sales based on past or present sales levels, future sales projections, or industry trends" to prove intentional interference with prospective economic advantage. Swift-Eckrich also submitted jury instructions that instructed the jury that generalized evidence was insufficient to establish the tort. The Court denied the motion in limine and declined to give the jury instruction. (Linder Decl., ¶¶ 6-7.)

The only plausible explanation for an award of antitrust damages that is exactly three times the award of intentional interference damages is that the jury incorrectly believed that it was permitted to (or supposed to) return a verdict of treble damages. This, of course, was incorrect. *See Semke v. Enid Auto. Dealers Assn.*, 456 F.2d at 1370 ("in an antitrust case, it is not for the jury to fix the amount of the judgment. Its function is completed once it determines the amount of damages"). The jurys error, which is now embodied in the $18 million judgment, cannot be allowed to stand. The correct amount of the award on the antitrust claim should be $6 million ($2 million x 3 = $6 million), and the Court should order a remittitur and reduce the judgment accordingly. Even more so than in the cases discussed above, the $4 million discrepancy in the jurys verdict here shows a compelling need for a remittitur or a new trial on damages. *Compare, Video Int'l Productions,* 858 F.2d at 1085 ($1.245 million discrepancy warranted new trial); *Rosario v. Livdditis,* 963 F.2d at 1020-21 ($600,000 discrepancy warranted new trial).

IV. IF UNITHERM WILL NOT ACCEPT A REMITTITUR, THEN A NEW TRIAL SHOULD BE ORDERED ON THE ISSUE OF ANTITRUST DAMAGES.

If the Plaintiff does not accept the remittitur, the Court may order a new trial on damages pursuant to Fed. R. Civ. P. 59(a).[5] *Holmes v. Wack,* 464 F.2d 86, 89 (10th Cir. 1972)

[5] Fed. R. Civ. P. 59 (a) provides, in pertinent part: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . ."

("where the court believes the judgment for damages is excessive, that is, it is against the weight of the evidence, the court may order a remittitur and alternatively direct that there be a new trial if the plaintiff refuses to accept it"); *Malandris v. Merrill Lynch,* 703 F.2d at 1178 (if plaintiff were unwilling to accept remittitur reducing damages award, then new trial should be ordered); *Video Int'l Production, Inc.,* 858 F.2d at 1086 (new trial on damages necessary to resolve "the confusing conflict among the various awards".

If Unitherm will not accept a reduction of the judgment to bring the award into compliance with the antitrust laws, the Court should order a new trial to resolve the discrepancy between the $2 million intentional interference award and the $6 million antitrust award, both of which were based on exactly the same evidence.

V. CONCLUSION

To prevent a manifest miscarriage of justice, the Court is respectfully requested to issue a remittitur reducing the amount of antitrust damages from $18 million to $6 million and enter the [Proposed] Amended Judgment filed concurrently herewith.[6] If Unitherm refuses to accept the remittitur, the Court should order a new trial on the issue of antitrust damages.

---

[6] As indicated in the [Proposed] Amended Judgment, Swift-Eckrich also requests that the form of judgment indicate that Unitherm did not prove its fraud claim, and therefore, recovers nothing on that claim.

Dated: April 8, 2003

By s/ Robert A. Schroeder
Robert A. Schroeder
Leigh O. Linder
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue, Ste. 4400
Los Angeles, CA 90071
(213) 680-6400

Robert D. Tomlinson OBA# 9056
McKINNEY & STRINGER, P.C.
101 North Robinson, Suite 1300
Oklahoma City, Oklahoma 73102
Tel: (405) 239-6444
Fax: (405) 239-7902

John P. Passarelli
David H. Roe
McGRATH NORTH MULLIN & KRATZ
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
Tel: (402) 341-3070
Fax: (402) 341-0216

Attorneys for Defendant

APPENDIX J — DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003 PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND FILED APRIL 23, 2003 (R. A6444-6457)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Case No. CIV 01-347-C

UNITHERM FOOD SERVICES, INC., an Illinois corporation; and JENNIE-O-FOODS, INC., a Minnesota corporation,

Plaintiffs,

vs.

SWIFT-ECKRICH, INC. d.b.a. CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003 PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND

Appendix J

Pursuant to Fed.R.Civ.P. 59(e), Defendant Swift-Eckrich, Inc. ("Swift-Echrich") respectfully requests that the Court amend the Judgment entered on April 9, 2003 ("Attorney Fee Judgment") by combining it with the earlier judgment entered on March 27, 2003 ("Merits Judgment"); thereby creating a single amended judgment reflecting both the final damages award and the attorney fee award. The interests of judicial economy and convenience will be served by entering a single amended judgment because the case can then proceed to the Federal Circuit as a single appeal.

Plaintiff, Unitherm Food Systems, Inc. ("Plaintiff") will suffer no prejudice if the requested amended judgment is entered. Defendant proposes to post a supersedeas bond in the amount of the damages award plus $1,022,445.00 (the amount of the stipulated attorney fee award). This amount will adequately protect Plaintiffs interests in the collectability of the Judgments. Pursuant to Fed.R.Civ.P. 62(d) and-LCvR 62.2(b), Defendant requests that the Court approve this amount as the bond amount.

I. THE COURT SHOULD ENTER A SINGLE AMENDED JUDGMENT REFLECTING THE DAMAGES AWARD AND THE ATTORNEY FEE AWARD.

On March 27, 2003, the Court entered judgment on the jury's verdict (Exh. 1.) This Merits Judgment provides for Plaintiffs recovery of $18 million as damages on the claim for attempted monopolization, but is the subject of a post-trial motion under Rule 59(e) filed by Defendant on April 10, 2003. Because Plaintiff's opposition to that motion is not due until April 28, a ruling is not expected at this time.

The antitrust statutes provide that a prevailing plaintiff shall recover a reasonable attorney fee. 15 U.S.C. §15. On April 7, 2003, the parties stipulated to the ***amount*** of the fee award that Plaintiff would recover. (Defendant, however, disputes Plaintiffs ***entitlement*** to its fees, which was awarded based solely upon its status as the prevailing party on a fatally flawed federal antitrust claim). On April 9, 2003, the Court entered a separate judgment awarding Plaintiff $1,022,445 as a reasonable attorney fee ("Attorney Fee Judgment"). (Exh. 2.)

Defendant intends to file notices of appeal *from* both Judgments.[1] The deadline for filing a notice of appeal from

[1] Appeal from an attorney fee award must be taken separately from any appeal from a judgment on the merits of the underlying case. Otherwise, the appellate court has no jurisdiction as to the fee award. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1160 (9th Cir. 1999) (notwithstanding reversal of judgment on merits, appellate court (Cont'd)

the Attorney Fee Judgment is May 9, 2003. *See* Fed.R.App.P. 4(a)(1)(A) (30 days from entry of judgment). However, the deadline *for* filing a notice of appeal from the Merits Judgment is expected sometime later due to the pending post-trial motion. *See* Fed.R.App.P. 4(a)(4)(A)(iv) (notice of appeal to be filed within 30 days after order disposing of last post-trial motion).

Because the Merits Judgment and the Attorney Fee Judgment are intertwined and interdependent, the interests of judicial economy would be served if the matters were heard in a single appeal. However, because of the timing of entry of the respective judgments, Defendant is now in the untenable position of having to commence an appeal on the Attorney Fee Judgment before the Merits Judgment is ripe for appeal. Entry of a single amended judgment reflecting the damages award **and** the attorney fee award would allow the parties to pursue a single appeal as to all issues in this case.

II. GOOD CAUSE EXISTS FOR THE COURT TO ENTER A SINGLE AMENDED JUDGMENT.

A judgment may be altered or amended on motion of a party pursuant to Fed. R. Civ. P. 59(e). The Federal Rules of Civil Procedure no longer require entry of a "separate"

(Cont'd)
lacked jurisdiction to reverse fee award because no timely notice of appeal had been filed as to fee award); *California Med. Ass'n v. Shalala, 207* F.3d 575, 576 (9th Cir. 2000) (same); *Bogle v. Orange County Bd. of County Comm'rs*, 162 F.3d 653, 661 (11th Cir. 1998).

judgment for attorney fees. Effective December 1, 2002, Rule 58(a)(1) was amended to provide that "[e]very judgment and amended judgment must be set forth on a separate document, ***but a separate document is not required for an order disposing*** of ***a motion: . . . (C) for attorney fees under Rule 54*** . . . ." (Emphasis added to language added by amendment.)

Here, entry of a single amended judgment will eliminate the need for Defendant to file two separate appeals and later move to consolidate those proceedings. *See* Fed.R.App.P. 42(a). Combining the judgments also would allow Defendant to post a single supersedeas bond (thereby avoiding administrative costs associated with posting two separate bonds) and would ensure that execution on Attorney Fee Judgment is stayed pending the post-trial motion briefing and the filing of a notice of appeal on the Merits Judgment. Most significantly, Defendant will not be left in the untenable position of having to prosecute an appeal for the Attorney Fee Judgment while the District Court still has jurisdiction over the merits of the underlying case including the very cause of action that gave rise to the fee award in the first place.

Plaintiff will suffer no prejudice if a single amended judgment is entered. Defendant proposes the posting of a supersedeas bond pursuant to Fed.R.Civ.P. 62(d) and LCvR 62.2(b)[2] based on the combined total of the two Judgments.

---

[2] LCvR 622(b) indicates that the amount. of the .bond maybe set upon motion to the Court. That section provides: "On its own motion, or ***upon the motion of a party*** in interest, the Court may at any time order any party to give security, bond or undertaking in such amount as the Court may order for the payment of costs or for performance of other conditions or requirements imposed in an action or proceeding." (Emphasis added.) (Cont'd)

Thus, Plaintiff's interest in preserving a fund to cover the amount of the combined Judgments will be protected.

III. IF A SUPERSEDEAS BOND IS ORDERED AS A CONDITION TO STAY, THE PRINCIPAL AMOUNT OF THE BOND SHOULD NOT EXCEED THE AMOUNT OF THE DAMAGES AWARD PLUS FEES.

Defendant Swift-Eckrich is a wholly-owned subsidiary of Conagra Foods, a publicly traded company that had $27.6 million in sales for 2002. There is no legitimate basis for suggesting that Plaintiffs' judgment would be uncollectable if Defendant's appeal proves to be unsuccessful. If the Court is inclined to order a supersedeas bond at all, the principal amount of the bond should not exceed the combined total of the damages award and the fee award and need not require additional amounts to cover interest accruing during the appeal. If Defendant's Remittitur Motion is granted, the principal amount of the supersedeas bond staying execution of both Judgments (or the single amended judgment requested in this motion) should not exceed $7,022,445 ($6 million + $1,022,445 = $7,022,445). If the Motion is not granted the amount of the bond should not exceed $19,022,445 ($18,000,000 + $1,022,445= 519,022,445).

(Cont'd)

Fed.R.Civ.P. 62(d) provides: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal . . . . The stay is effective when the supersedeas bond is approved by the court."

IV. CONCLUSION.

For all of the reasons stated above, the Court should enter single amended judgment reflecting both the final damages award and the attorney fee award. Further, the principal amount of any supersedeas bond required of Defendant should not exceed the combined total of the damages award and the fee award.

Dated: April 21 2003

By s/ Robert A. Schroeder
Robert A. Schroeder
Leigh O. Linder
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue, Ste. 4400
Los Angeles, CA 90071
(213) 680-6400

Robert D. Tomlinson OBA# 9056
MCKINNEY & STRINGER, P.C.
101 North Robinson, Suite 1300
Oklahoma City, Oklahoma 73102
Tel: (405) 239-6444
Fax: (405) 239-7902

John P. Passarelli
David H. Roe
McGRATH NORTH MULLIN & KRATZ
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
Tel: (402) 341-3070
Fax: (402) 341-0216

Attorneys for Defendant

APPENDIX K — PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL REGARDING ANTITRUST DAMAGES FILED APRIL 28, 2003 (R. A6458-6495)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., and JENNIE-O FOODS, INC., now known as JENNIE-O TURKEY STORE, INC.,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS,

Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL REGARDING ANTITRUST DAMAGES

Appendix K

Plaintiffs hereby respond to "Defendant Swift-Eckrich's Motion For Remittitur Reducing Damage Award On Antitrust Count, Or, In The Alternative, For New Trial On Antitrust Damages" (the "Motion") and state as follows:

SUMMARY OF THE ARGUMENT

Buried within Swift-Eckrich's Motion is the following statement which is necessary to the Motion's success: "Indeed, it would be unrealistic to pretend that the jury did not know that antitrust damages are to be trebled. The foreman of the jury was the chairman of a university Political Science department." (Defendant's Motion p. 6). In other words, notwithstanding the high standard governing Swift-Eckrich's Motion and notwithstanding the fact that not a word was spoken to the jury during the trial by the Judge, counsel, parties or witnesses regarding trebling damages, Swift-Eckrich is asking this Court to assume the jury violated the instructions and trebled the damages. And for this result, Swift-Eckrich cites a declaration of its own attorney. The Motion is truly absurd and should be summarily denied.

Swift-Eckrich's Motion is also procedurally and substantively infirm. Swift-Eckrich did not object to this purportedly "obvious" inconsistency in the verdict until after the jury had been discharged. It has, therefore, waived any right to rely upon such an inconsistency. If there truly was such an inconsistency (which there was not), the Court should have been given the opportunity to resubmit the issue to the Jury to clarify its verdict. Further, Swift-Eckrich submits a proposed alternative judgment with its Motion, but it agreed to the form of the Judgment already entered in this case.

Appendix K

The verdict is not inconsistent. While the Court is required to adopt any reasonable reconciliation of alleged inconsistent verdicts, it need not stretch to do so here. The jury's verdict is entirely consistent with the Court's instructions. The instructions on intentional interference with prospective economic advantage allowed damages only upon proof regarding specific customer relationships. Consistent with the law set forth by the United States Supreme Court and United States Court of Appeals for the Tenth Circuit, the Court instructed that antitrust law permits a broader standard of damages, including past and future lost profits, and does not require precision in the proof thereof. The fact that the jury awarded $6 million in antitrust damages, and $2 million in tort damages is entirely consistent with these instructions and can in no way entitle Swift-Eckrich to remittitur or new trial.

BACKGROUND

Following approximately eight days of jury trial, on March 19, 2003, the jury reached a verdict. (*See* Exhibit "A" attached hereto). The Jury awarded Unitherm (hereafter "Plaintiff") damages on the claim of attempted monopolization in the amount of $6,000,000. The jury awarded damages on the claim of intentional interference in the amount of $2,000,000, and found by clear and convincing evidence that Defendant acted in reckless disregard of the rights of others. After the second stage punitive damages proceedings, the jury awarded Plaintiff an additional $2,000,000 in punitive damages against Swift-Eckrich on the claim of intentional interference.

Appendix K

After the parties conferred, Plaintiffs and Defendant agreed to a form of judgment trebling the jury verdict on the antitrust claim, it having been agreed that any damages on the intentional interference claim are subsumed within the antitrust damages.

Defendant did not raise an objection at trial that the jury's verdict was somehow inconsistent. When the parties were discussing the proper form and amount of judgment to be entered, Defendant never raised an objection or any other concern that the jury had somehow already trebled the damages. At no time prior to the verdict being rendered, did the Court, or anyone else, suggest to the jury that their damages for antitrust damages should be trebled.

ARGUMENT AND AUTHORITY

A. Swift-Eckrich Has Waived Any Objection To The Verdict By Its Failure To Object Prior To The Discharge Of The Jury.

Swift-Eckrich has waived its right to raise the issue of inconsistent verdicts by failing to object before the jury was discharged. The Tenth Circuit[1] has held as follows: "A failure to object to general jury verdicts on the ground of inconsistency before the jury is discharged constitutes waiver . . ." *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993). In *Stone*, the Tenth Circuit found that where

[1] Where a party raises an argument of inconsistent verdicts, the Federal Circuit follows the law of the regional forum circuit, here the Tenth Circuit. *See EMI Group N.Am., Inc. v. Cypress Semiconducter Corp.*, 268 F.3d 1342, 1347 (Fed. Cir. 2001).

the verdict form contained a single question as to each count for liability and a separate question for each count as to damages, the verdict form was a "general verdict." *Id.* at 1545-46; *see also Thompson v. State Farm Fire & Cas. Co.*, 34 F.3d 932, 944-45 (10th Cir. 1994) (appellant waived argument relating to inconsistency in general verdict with special interrogatories and reviewed for plain error where not raised before discharge of jury).

"The purpose of the rule is to allow the original jury to eliminate any inconsistencies without the need to present the evidence to a new jury." *Coralluzzo v. Education Mgmt. Corp.*, 86 F.3d 185, 186 (11th Cir. 1996) (citing cases). The court in *Coralluzo* quoted the First Circuit as follows:

> To allow a new trial after the objecting party failed to seek a proper remedy at the only time possible [i.e., before the jury is discharged] would undermine the incentives for efficient trial procedure and would allow the possible misuse of Rule 49 procedures . . . by parties anxious to implant a ground for appeal should the jury's opinion prove distasteful to them.

Id. (quoting *Skillin v. Kimball*, 643 F.2d 19, 20 (1st Cir. 1981)).

The verdict form in the case at bar is conceptually identical to the form in *Stone*. The jury was asked to find liability as to each cause of action and then asked to find damages for each count if a liability verdict was found. Swift-Eckrich's failure to raise this issue before the discharge of

the jury constitutes a waiver, and the Court should reject its Motion. While no inconsistency existed in the verdict, the jury in this case could have quickly and easily corrected any ambiguity or inconsistency in its verdict had Swift-Eckrich raised it before they were discharged. Defendant cannot now use their own neglect to their strategic advantage and gain another bite at the damages apple.

B. Swift-Eckrich Is Not Entitled to Remittitur or New Trial.

1. Standard On New Trial Motion Challenging Damages Or Raising An Inconsistency In the Verdict.

The standard on a motion for new trial is high, and Swift-Eckrich's Motion is very weak. To prevail on its Motion, Swift-Eckrich must carry the burden to show that "the verdict is 'clearly, decidedly, or overwhelmingly against the great weight of the evidence.'" *Patton v. TIC United Corp.*, 77 F.3d 1235, 1242 (10th Cir. 1996) (quoting *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 616-17 (10th Cir. 1984)).

"[T]he jury, which has the first-hand opportunity to hear testimony and observe the demeanor of witnesses, has discretion to fix damages. We will not disturb a jury's award of damages unless the award is so unreasonable 'as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial.'" *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1300-01 (10th Cir. 1998) (quoting *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985)). Likewise, the Tenth Circuit

recently affirmed this Court's denial of a remittitur and new trial motion stating the following:

> We review a district court's disposition of a motion for remittitur or new trial on damages for a manifest abuse of discretion. . . . In order to establish an abuse of discretion, the party that moved unsuccessfully for a new trial on the basis of an excessive verdict carries the heavy burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence. In applying the abuse of discretion standard, we are also mindful that absent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.

Telecor Comms., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1143 (10th Cir. 2002).

Further, Swift-Eckrich must "show that any verdict inconsistency demonstrates 'either confusion or abuse on the jury's part.'" *Domann v. Vigil*, 261 F.3d 980, 983 (10th Cir. 2001) (quoting *Global Van Lines, Inc. v. Nebeker*, 541 F.2d 865, 868 (10th Cir. 1976)). "In determining whether there is any inconsistency, we must accept any reasonable explanation that reconciles the jury verdict." *Id.* "[T]he trial court has a duty to try to reconcile the answers to the case to avoid retrial." *Harvey v. General Motors Corp.*, 873 F.2d 1343, 1346-47 (10th Cir. 1989).

Swift-Eckrich is legally off base in its attempt to find a conflict by looking only at the two verdicts. The Court may not confine itself to such a narrow view of the case:

> The reconciliation of the jury's responses, however, is not merely to one another, but to the entire *case*. . . . "Presumptions and intendments will not be indulged to establish a contradiction, it being the duty of the court to reconcile or harmonize the special findings or answers to special interrogatories *with each other*, if it can reasonably be done." . . . More recently, in *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1425 (10th Cir.), *cert. denied*, 479 U.S. 1007, 107 S. Ct. 647, 93 L.Ed.2d 702 (1986), we reconciled the jury's verdict on each separate cause of action to the case rather than to one another.

Id. at 1348 (quoting *Bass v. Dehner*, 103 F.2d 28, 34 (10th Cir. 1939)).

Moreover, a Court may not simply recalculate the jury's damages determination based upon its own view of the case without running afoul of the Plaintiffs' Seventh Amendment right to a jury trial. Swift-Eckrich's efforts here to indulge all inferences in its favor in order to create an inconsistency in the jury's verdict "results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S. Ct. 780, 786 (1962).

Appendix K

2. The Jury's Verdict Was Entirely Consistent Under Any Standard.

Swift-Eckrich has not identified any rational or reasonable support for its contention that the jurors disregarded the instructions and trebled the damages, themselves. In fact, its explanation that the jury *sua sponte* trebled its own damages award is without any record support and is simply baffling.

None of the instructions read by the Court refer to trebling damages. None of the testimony referred to trebling damages. None of the argument from counsel referred to trebling damages. Yet, Swift-Eckrich asks the Court to take a giant inferential leap on its behalf and find that the jury trebled the damages themselves, because the foreman is the Chairman of a university Political Science Department. One would presume that the Chairman of the university Political Science Department would also know enough about the judicial system to have understood Judge Cauthron's instructions on damages and the different roles of judges and juries.

Crediting Swift-Eckrich's arguments in this regard would turn the judicial system on its head. Contrary to all law in every federal judicial circuit, Swift-Eckrich asks the Court to give the party against whom a jury has rendered a damages verdict every favorable inference, even the wild inference proffered by Swift-Eckrich. Instead, it obviously is the Court's duty to presume that the jury followed the instructions and grant the jury determination every rational inference in favor of upholding the verdict.

Appendix K

Because Swift-Eckrich has not identified any inconsistency in the verdict, neither the Court nor Plaintiffs should be required to attempt to reconcile them. Nevertheless, not only are these verdicts reconcilable, but they are entirely consistent with the standards set forth in the instructions. The alleged inconsistency identified by Swift-Eckrich simply does not exist.

Once again, Swift-Eckrich contends that because Plaintiff put on proof of lost profits regarding both the antitrust and tort claims, the jury necessarily must have found only $2 million damages and then trebled the damages themselves to reach the $6 million antitrust verdict. Consequently, Swift-Eckrich argues, it is entitled to a remittitur of the $18 million antitrust verdict to $6 million.[2]

Swift-Eckrich is incorrect. The verdicts are consistent and do not need reconciling. The two counts were not based upon the same legal standard. Regarding Plaintiff's standard of proof for liability on its claim for attempted monopolization, the Court instructed the Jury as follows:

> It is not necessary that you find that all of Defendant's conduct being challenged by Plaintiff was predatory or exclusionary for Plaintiff to

---

[2] As Swift-Eckrich has presented absolutely no proof that the jury trebled the damages, its argument begs the question why the tort damages should not be increased by additur to $6 million if the two verdicts were based on the same standard, as it asserts (thereby entitling the jury to return punitive damages of $6 million, also). Why should Swift-Eckrich, the losing party, be given the presumption that the jury erred in its favor?

> prevail. It is enough for you to find that any one or more of the separate forms of Defendant's conduct, any combination of Defendant's conduct, or the totality of Defendant's conduct was predatory or exclusionary.

(Instruction No. 12, attached hereto as Exhibit "B".) Likewise, on dangerous probability of success, the Court instructed as follows:

> A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real; that is, that there was a reasonable likelihood that Defendant would ultimately achieve its goal of monopoly power.

(Instruction No. 13, Ex. B.) Further, regarding Attempt to Monopolize Injury, the Court instructed as follows:

> To establish injury, Plaintiff must prove that some damage flowed to Unitherm as a result of Defendant's alleged attempt to gain a monopoly. The fact that Plaintiff suffered economic losses or hardship is not enough. Plaintiff must demonstrate those economic losses or hardship were at least in part the result of Defendant's attempt to gain a monopoly. Plaintiff is not required to prove that Defendant's alleged attempt to gain a monopoly was the sole cause of their injury; nor must Plaintiff eliminate all other possible causes of injury. It is enough if Plaintiff

> proves that the alleged attempt to gain a monopoly was a material cause of its injury. Injury may be established by inference or circumstantial evidence. . . .

(Instruction No. 14, Ex. B.) Consequently, to prevail on Plaintiff's antitrust claim, it was not required to prove any special injury or relationship with a particular customer.

By contrast, the Court instructed the jury upon a more rigorous standard of liability on Plaintiff's tortious interference count requiring the identification of a specific relationship:

> Interference includes inducing a third person not to enter into the prospective relation or preventing the other party from acquiring the prospective relation. . . . The interference is intentional if Defendant acted with the purpose to interfere with the relationship or expectancy.

(Instruction No. 15, Ex. B.) The Court further instructed as follows:

> Plaintiff must show that the business relationship or expectancy that was interfered with was between Plaintiff and a third party. . . .
>
> * * * *
>
> Plaintiff may not rely solely on generalized evidence of lost sales based on past or present sales levels, future sales projections or industry trends.

(Instruction No. 16, Ex. B.) The Court also instructed that "Plaintiff must show that Defendant acted with the intent to interfere with *the* relationship or expectancy." (Instruction No. 17, Ex. B; emphasis added).

Thus, losses from interference with specific customers are subsumed within Plaintiff's overall lost profits. But Plaintiff's proof of lost profits as a result of Defendant's antitrust violations was not confined to specific customer relationships.

This view of the verdicts is made manifest by the Court's instructions as to damages. Regarding the attempt to monopolize cause of action the Court instructed on damages as follows:

> In arriving at the amount of the award, you should include any damages suffered by Plaintiff because of lost profits; that is to say, profits that Plaintiff would have made, but for the unlawful conduct of Defendant.
>
> The fact that the precise amount of Plaintiff's damages may be difficult to ascertain should not affect Plaintiff's recovery, particularly if Defendant's wrongdoing has caused the difficulty in determining the precise amount. . . .
>
> In determining the amount of profits lost by Plaintiff, you may consider evidence relating to the profits Plaintiff has not received in the past, and will not receive in the future, because of Defendant's past unlawful conduct.

> You may calculate Plaintiff's past and future lost profits by considering evidence of the market share Plaintiff would have had in the absence of Defendant's conduct, evidence of the size of the market, and evidence relating to the profit margin Plaintiff would have secured on the browning lines included in that market. In other words, Plaintiff's lost profits constitute the difference between what Plaintiff could have earned in an open market had there been no unlawful conduct by Defendant, and what Plaintiff actually earned and will earn.
>
> In determining whether or not any part of Plaintiff's damages constitute future lost profits, you must consider the experience of Plaintiff's officers in the business, the competition that Plaintiff would have had in the United States, and the general market conditions in such area.

(Instruction No. 21, Ex. B.)

This is a much broader standard than that set forth in Instruction No. 16 above with respect to liability for intentional interference, which excluded the jury from considering some of the evidence expressly set forth in Instruction No. 21. While the jury could consider generalized evidence of lost profits, past and future, and market conditions with respect to the antitrust claim, the jury was prohibited from doing so regarding the tort claim, without proof of interference with a specific relationship. Plaintiff's damages expert, Dr. Jeffrey Kinrich, calculated Plaintiff's lost profits through the year 2003. (Defendant's Exhibit 1 to

Motion, p. 8, lines 9, *et seq.*) Instruction No. 22 relating to damages for intentional interference further confirms this distinction by omitting the broad language of Instruction No. 21 and instructing the jury: "These damages are measured by the amount of money that will compensate Plaintiff for the loss of the economic relationship." (Instruction No. 22, Ex. B).

The explanation for the difference in the verdicts, therefore, is that the jury followed the instructions of the Court and applied a more stringent test for liability and damages for intentional interference.

The jury's verdicts are further buttressed by the law of antitrust damages. The Court's decision to establish a less rigorous standard of damages proof for the antitrust claim follows long-standing Supreme Court and Tenth Circuit law. *Texaco, Inc. v. Hasbrouk*, 496 U.S. 543, 572-73, 110 S. Ct. 2535, 2551-52 (1990) ("At the same time, however, we reaffirmed our traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury;" possible flaw in jury's damages calculation would not be sufficient to grant JNOV). The Tenth Circuit recently affirmed an antitrust damages verdict in this Court stating as follows:

> [Defendant] faces a steep uphill climb in attempting to overturn the jury's damages award. In addressing a challenge to a jury's damage award in an antitrust case, the Supreme Court held that the award "must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion

> from the facts." . . . We have said that, even where a "persuasive" explanation of the jury's damages award indicates an award contrary to law, the possibility of a proper explanation, "[h]owever slight the chance," will suffice to sustain the damages award.

Telecor Comms., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1143 (10th Cir. 2002) (internal citations omitted); *see also Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1525-26 (10th Cir. 1984), aff'd, 472 U.S. 585, 105 S. Ct. 2847 (1985) (explaining why damages in antitrust cases necessarily rely upon estimates of injury which may not be sufficient in other contexts).

Not only is there a rational explanation to reconcile the jury's verdicts on the antitrust and tort claims, but the most reasonable and natural explanation supports it -- the jury followed the instructions and the law. Furthermore, Defendant did not object to any of the Court's damages instructions. (Instruction Nos. 20, 21, 22, 23, 24, Ex. B).

CONCLUSION

The foregoing considered, Swift-Eckrich's Motion for Remittitur Reducing Damage Award On Antitrust Count, Or, In The Alternative, For New Trial On Antitrust Damages is meritless and should be summarily denied.

Appendix K

Dated: April 28, 2003

Respectfully submitted,

s/ Jay P. Walters
Burck Bailey, OBA # 415
Greg A. Castro, OBA # 11787
Jay P. Walters, OBA # 17364
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820
Telephone: (405) 232-0621
Facsimile: (405) 232-9659

-and-

Dennis D. Brown, OBA #13662
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
321 South Boston, Suite 800
Tulsa, OK 74103-3318
Telephone: (918) 599-0621
Facsimile: (918) 583-9659

Attorneys for Plaintiffs

APPENDIX L — REPLY BRIEF OF DEFENDANT SWIFT-ECKRICH, INC. IN RESPONSE TO PLAINTIFFS' OPPOSITION TO MOTION FOR REMITTITUR REDUCING DAMAGE AWARD OR FOR NEW TRIAL FILED MAY 7, 2003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Case No. CIV 01-347-C

UNITHERM FOOD SERVICES, INC., an Illinois corporation; and JENNIE-O-FOODS, INC., a Minnesota corporation,

Plaintiffs,

vs.

SWIFT-ECKRICH, INC. d.b.a. CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

REPLY BRIEF OF DEFENDANT SWIFT-ECKRICH. INC. IN RESPONSE TO PLAINTIFFS' OPPOSITION TO MOTION FOR REMITTITUR REDUCING DAMAGE AWARD OR FOR NEW TRIAL

Appendix L

ROBERT D. TOMLINSON, ESQ.
McKINNEY & STRINGER, P.C.
101 North Robinson, Suite 1300
Oklahoma City, Oklahoma 73102-5504
Telephone: 405/239-6444
Facsimile: 405/239-7902

ROBERT A. SCHROEDER, ESQ.
LEIGH O. LINDER, ESQ.
BINGHAM MCCUTCHEN LLP
355 South Grand Ave., 45th Floor
Los Angeles, California 90071
Telephone: 213/680-6400
Facsimile: 213/680-6499

JOHN P. PASSARELLI, ESQ.
DAVID H. ROE, ESQ.
McGRATH, NORTH, MULLIN & KRATZ
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
Telephone: 405/236-8911
Facsimile: 405/236-0011

Appendix L

REPLY BRIEF OF DEFENDANT SWIFT-ECKRICH, INC. IN RESPONSE TO PLAINTIFFS' OPPOSITION TO MOTION FOR REMITTITUR REDUCING DAMAGE AWARD OR FOR NEW TRIAL

I. SWIFT-ECKRICH'S RIGHT TO A REMITTITUR OR NEW TRIAL HAS NOT BEEN WAIVED.

Under Fed.R.Civ.P. 59(e), a motion to amend a judgment is timely if made within 10 days of the entry of that judgment, a requirement that indisputably has been met by Swift-Eckrich. Nevertheless, Unitherm argues that this motion is untimely because Swift-Eckrich purportedly was required to make the motion before the jury was discharged.

The most recent Tenth Circuit case that addresses Unitherm's "waiver" argument *is Brown v. Presbyterian Health Care Services,* 101 F.3d 1324, 1332 (10th Cir. 1996). The facts of *Brown* are strikingly similar to the facts of this case. Indeed, there is no closer precedent. In *Brown,* the jury awarded both compensatory and punitive damages on an antitrust claim. The district court granted the defendant's motion to amend the judgment under Rule 59(e), eliminating the punitive damages. The Tenth Circuit held that this ruling by the district court was "proper and in accordance with the law." *Id.* at 1339. The Court rejected the plaintiff's waiver argument based on the absence of an objection before the jury was discharged, and there is no more basis for that argument here than there was in *Brown.*

The holding of the Brown case on the substance of the matter was that: "[i]t is clearly improper to allow a plaintiff

to recover punitive damages along with trebled damages on an antitrust claim." *Id.* at 1332. A further holding was that: "[t]he district court's decision to vacate the award of punitive damages served to correct a manifest error of law and did not prejudice [the plaintiff]." *Id.* By the same reasoning, it is improper in this case for the Court to have trebled antitrust damages when the circumstances compelled the conclusion that those damages have already been trebled by the jury. This Court should, therefore, correct that error of law.

It is particularly important to note that we are not concerned here with any inconsistency ***within the verdict itself***. In theory, there is no reason why the damages for antitrust violations could not have been $6 million, or why the intentional interference damages could not have been $2 million, assuming there was evidence to support these conclusions. However, this motion is based on the fact that neither the evidence nor the argument in this particular case can possibly provide a basis for the three-to-one ratio between the two awards. The problem here is not that there is inconsistency within the verdict, but that the evidence does not support the verdict and compels the conclusion that there was an error of law, *i.e.*, that the jury trebled the compensatory damages.

Before discussing the authorities relating to Unitherm's waiver argument, it is helpful to put this argument in context. It has not been contended by Unitherm -- nor by anyone else, to our knowledge -- that the right to make a motion for a new trial is always waived unless made before discharge of the jury. Any such contention would contradict the plain language of Rule 59 itself. Logically, a waiver can occur only

when the failure to make the motion before discharge of the jury deprives the court of an opportunity to take some corrective action permitted under the particular circumstances of the case.

That corrective action is uniquely provided for in Rule 49(b),[1] which allows the Court to "return the jury for further consideration." However, there is no similar option to "return" a jury to be found anywhere *except in* Rule 49(b). Thus, the rule can be applied only when two conditions are met: (1) there is a general verdict, not a special verdict under Rule 49(a)[2]; ***and*** (2) the general verdict is "accompanied by

[1] Rule 49(b) provides: "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. ***When the answers are consistent with each other but one or more is inconsistent with the general verdict***, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, ***or the court may return the jury for further consideration of its answers and verdict or may order a new trial***. When the answers are inconsistent *with* each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." (Emphasis added.)

[2] Rule 49(a) provides, in pertinent part: "The court may require a jury to return only a special verdict in the form of a special written

(Cont'd)

answers to interrogatories." Fed.R.Civ.P. 49(b). Accordingly, there can be no waiver if there is a ***special*** verdict, nor if there is a general verdict ***without*** interrogatories.

The waiver rule now relied upon by Unitherm appears to have originated in the Tenth Circuit in *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416 (10th Cir. 1986), which cites no earlier precedent. Two aspects of *Diamond Shamrock* make clear that waiver is not appropriate under the circumstances of this case. First, the *Diamond Shamrock* Court, sought to "harmonize" the timeliness provisions of Rule 59 with Rule 49(b), which pertains to a "General Verdict Accompanied by Answer to Interrogatory." *Id.* at 1421. Under Rule 49(b), as noted above, a procedure exists that allows the court to "return the jury for further consideration of its answer," but only where there is a general verdict ***with interrogatories.*** *See id.* at 1421. To reach its finding of waiver, the *Diamond Shamrock* court had to treat the verdict before it as if it were an inconsistent general verdict ***with interrogatories***,[3] to which no objection was asserted before

(Cont'd)
finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate . . . ."

[3] This is exactly what the majority in *Diamond Shamrock* did. The dissent observed: "Although nothing in the court's opinion suggests that this 'general verdict' was accompanied by responses to 'written interrogatories,' the court relies on Rule 49(b) of the Federal Rules of Civil Procedure to reach the conclusion that 'the instant case is a proper case to invoke the harsh impact of the waiver rule.'" *Id.* at 1426.

discharge of the jury. In contrast, in this case, there was no general verdict with interrogatories, no invocation of Rule 49(b), no option for the Court to return the jury for further consideration, no competing Rules to harmonize, and therefore, no basis for finding a waiver.

A second aspect of *Diamond Shamrock is* that: "[t]he trial court had previously informed counsel that the jury's general verdict should be carefully examined and any objections thereto lodged." *Id.* at 1421-22. It was under these circumstances that a waiver was found because appellant *"did not* move for resubmission pursuant to Rule 49(b) before the jury was discharged." *Id.* at 1422 (Emphasis in original.) In the present case, however, no such instruction to counsel was given, nor could such an instruction have been given since Rule 49(b) was not involved.

Unitherm, making an unsound waiver argument, relies on cases that predate the holding in *Brown* that there was no waiver. *Thompson v. State Farm Fire & Cas. Co.*, 34 F.3d 932, 944-45 (10th Cir. 1994) involved interrogatories and thus ***did*** invoke Rule 49.The *Thompson* court explicitly recognized the invocation of Rule 49(b) and stated:

> In this instance Part 1 of the Verdict Form reproduced in the Appendix is plainly a ***general verdict*** (see, *e.g., Stone,* 998 F.2d at 1547), while Part 4 just as plainly sets out ***accompanying interrogatories***.

Id. at 944-45 (emphasis added.) (The verdict form is reproduced at page 945 of the Court's opinion.) Thus,

Thompson is entirely consistent with *Diamond Shamrock* in that the waiver was premised on the invocation of the provisions of Rule 49(b). Although courts may at times, in this context, simply contrast special verdicts under Rule 49(a) with "general verdicts" under 49(b), it is nevertheless clear in context that the waiver rule applies only to those general verdicts ***that include interrogatories***. Indeed, another case cited by Unitherm, *Coralluzzo v. Education Mgmt. Corp.*, 86 F.3d 186, 186 (11th Cir. 1996), also explicitly bases its finding of a waiver on the court's concern with "the possible misuse of ***Rule 49 procedures***." *Id., quoting Skillin v. Kimball,* 643 F.2d 19, 20 (1st Cir. 1981) (emphasis added).

The other cases cited by Unitherm are likewise consistent with the view that waiver for failure to object occurs only where the verdict involved interrogatories to the jury. In *Resolution Trust Corp. v. Stone,* 998 F.2d 1534, 1545, the court relied on *Diamond Shamrock* and stated that objections are unnecessary in the case of a special verdict, but necessary in the case of a general verdict. *Id.* at 1047-48. However, the verdict included the 25 separate questions (reproduced on page 1546 of the opinion) and apparently many more. Obviously, the special interrogatory provision of Rule 49(b) was found to have been invoked. In this case, however, there were no interrogatories, Rule 49(b) is not invoked, and there was no option to return the jury for further consideration. Again, there was no harmonizing between Rule 49 and 59 to be done. Thus, the waiver rule does not apply here.

In *Clyde v. General Motors Corp.*, 988 F.2d 1039 (10th Cir. 1993), another case addressing Unitherm's waiver argument, it is unclear whether or not interrogatories under

Rule 49 were involved, but is at least clear that, as in *Diamond Shamrock,* the court specifically instructed counsel to make any objections prior to discharge of the jury. *Clyde* cited and relies on *Diamond Shamrock. Id.* at 1048.

The Tenth Circuit has more recently confirmed that grant of a new trial is the proper remedy in circumstances similar to those at bar. In *Cholier, Inc. v. Torch Energy Advisors, Inc.*, 1996 U.S. App. LEXIS 9518 (10th Cir. 1996)[4] (an unpublished opinion rendered after appeal from judgment entered by Judge Leonard of the Western District of Oklahoma) plaintiff presented evidence of an agreement under which defendant was to pay a 15 percent contingency fee in connection with settlements that plaintiff negotiated with third parties. Plaintiff also asserted that there was an additional "agreement to agree" that allowed for a 30 percent recovery. The jury entered a general verdict awarding damages based on the 30 percent amount. Defendant moved under Rule 59 for a new trial on the ground that the jury's award was speculative and/or excessive. *Id.* at *15. The District Court denied the motion, and the Tenth Circuit reversed.

The appellate court rejected plaintiffs argument that "the general verdict form prevents us from knowing how the jury calculated damages." *Id.* at *6. Rather, it found that a new trial is proper "when the verdict is clearly and decidedly against the weight of the evidence," or when the "jury's award is speculative or excessive." *Id.* at * 14-15, citing *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir. 1995),

[4] Pursuant to 10th Circuit Local Rule 36.3, a copy of the case is attached.

cert. denied 116 S.Ct. 1017 and *Collier v Hoisting & Portable Eng'rs Local* Union No. 101, 761 F.2d 600, 603 (10th Cir. 1985).

> [T]he evidence must be considered in light of the requirements of the underlying cause of action. *See Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538 (5th Cir. 1984) (approving order for new trial where jury's verdict indicated a misunderstanding and misapplication of damages applicable to breach of contract and fraud claims. Thus, where it is apparent that certain identifiable sums were improperly included in the jury's verdict, an order of remittitur is appropriate, with an alternative order for a new trial if the plaintiff refuses to accept the remittitur.

Id. at * 16. The Court found that under Oklahoma law, any purported agreement to pay more than a 15 percent fee was too vague to be enforceable. "Thus, in basing its damages award on the 30% figure, the jury impermissibly ignored its instructions that damages for the breach of contract 'cannot be contingent or speculative.'" Accordingly, it was held that the District Court abused its discretion by denying defendant's motion for new trial. *Id.* at *19. Consistent with *Brown,* there is no indication in *Collier* that any request for a new trial was made or any relevant objection made before the jury was discharged.

II. IT IS WITHIN THIS COURT'S "CONSIDERABLE DISCRETION" TO REDUCE A DAMAGES AWARD WHERE, AS HERE, THE JURY HAS AWARDED IMPROPER AND EXCESSIVE DAMAGES.

A. Unitherm Badly Misstates The Moving Party's Burden On A Motion For Remittitur Or New Trial.

Unitherm erroneously suggests that Swift-Eckrich cannot prevail unless it meets an appellant's burden of proving that the district court abused its discretion in denying a motion for a new trial. For example, Unitherm offers a partial quotation from *Patton v. TIC United* Corp., 77 F.3d 1235, 1242 (10th Cir. 1996) to support its assertion that: "[t]o prevail on its Motion, Swift-Eckrich must carry the burden to show that 'the verdict is "clearly decidedly, or overwhelmingly against the great weight of the evidence.'" (Opp., p. 5.) Yet a more complete quotation from the same case makes quite clear that this standard guides the *reviewing* court, not the district court:

> A motion for a new trial on the ground that the verdict is against the weight of the evidence presents a question of fact, ***and we will not reverse*** unless the verdict is 'clearly, decidedly against the weight of the evidence.' *Id.*, emphasis added.

For the same reason, the other cases cited in the Opposition are unhelpful, as the quotations provided by Unitherm also describe the standards on ***appeal*** from an order denying a new trial. *E.g., Sanjuan v. IBP, Inc.,* 160 F.3d 1291,

1300-01 (10th Cir.1985) (appellate court will not disturb jury award except in certain circumstances); and *Telecor Comms., Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1143 (10th Cir. 2002) ("in order to establish *abuse of discretion,*" party that unsuccessfully moved for new trial has burden of demonstrating verdict was "clearly, decidedly, or overwhelmingly against the weight of the evidence"). At most, these cases merely reaffirm what the Tenth Circuit made clear in *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d at 1332: "to grant or deny a Rule 59(e) motion to alter or amend a judgment, *the district court is vested with considerable discretion." Id*; *see also Harvey v. General Motors Corp.*, 873 F.2d 1343, 1346-47 (10th Cir. 1989) (cited at page 6 of the Opposition; "[a] district court has broad discretion in deciding whether to grant a motion for a new trial").

B. Even Granting Unitherm Every Favorable Inference, The Jury's Verdict Still Reflects A Manifest Error Of Law.

As explained in the Motion, Tenth Circuit authority authorizes the district court to order a remittitur or new trial where the jury has awarded damages that are excessive and/or are not allowed by law.[5] Moreover, where the plaintiff tries its case as "one set of facts demonstrating a single injury for which the jury could find liability under any one or all of [multiple] theories," other Circuit Courts have found

[5] *See Brown*, 101 F.3 d at 1332; *Guides, Ltd. v. Yarmouth Group Property Mgt., Inc.*, 295 F.3d 1065, 1076-77 (10th Cir. 2002); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1167, 1178 (10th Cir. 1981).

"lopsided" damages awards -- ***without other evidence of juror misconduct or confusion*** -- to be a sufficient basis for concluding that the jury awarded damages that were excessive and/or contrary to law. *Video Int'l Production, Inc. v. Warner Amex Cable Communications, Inc.*, 858 F.2d 1075, 1085 (5th Cir. 1988); Rosario v. Livaditis, 963 F.2d 1013, 1020-21 (7th Cir. 1993). Unitherm makes no effort to distinguish these cases.

Contrary to Unitherm's suggestion, the error in the jury's award becomes clear when the verdict is considered in light of Unitherm's own arguments and evidence. Nowhere in the opposition does Unitherm deny that it argued vigorously for jury instructions that did not require it to present evidence of sales lost to intentional interference on a ***customer-by-customer*** basis, and that the Court agreed and gave the requested instructions over Swift-Eckrich's objection. Even more critically, Unitherm does not deny that it *did not present **evidence** from which the jury could have arrived at an antitrust award that was different from its intentional interference award.* Even though Unitherm identified lost prospective customers (e.g., House of Raeford, Sara Lee, Farmer John, Kraft, Zacky Farms, Carolina Turkey Company, Willow Brook Farms, Smithfield Foods and Farmland Foods), it did not present any evidence to quantify the profits it assertedly would have realized from these companies. Instead, it relied solely on a generalized damages calculation that used past sales levels to project lost profits, and it argued to the jury that the same calculation applied to both the antitrust and intentional interference counts. Therefore, differences in the instructions for intentional interference (compensation for "loss of the economic relationship") and

antitrust (damages "because of lost profit") cannot explain the verdict. Unitherm offered the jury only one way to calculate damages.

Viewed in light of Unitherm's own limited damages evidence, the three-times antitrust award unmistakably points to the jury's improper multiplication of the damage. There is ample basis for the Court to exercise its discretion to order a reduction of the antitrust compensatory damages award to $2 million.

III. CONCLUSION.

To prevent a manifest miscarriage of justice, the Court is respectfully requested to issue a remittitur reducing the amount of antitrust damages from $18 million to $6 million and enter the [Proposed] Amended Judgment filed concurrently herewith. If Unitherm refuses to accept the remittitur, the Court should order a new trial on the issue of antitrust damages.

Dated: May 7, 2003

By s/ Robert A. Schroeder
Robert A. Schroeder
Leigh O. Linder
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue, Ste. 4400
Los Angeles, CA 90071
(213) 680-6400

Robert D. Tomlinson OBA# 9056
MCKINNEY & STRINGER, P.C.
101 North Robinson, Suite 1300
Oklahoma City, Oklahoma 73102
Tel: (405) 239-6444
Fax: (405) 239-7902

John P. Passarelli
David H. Roe
McGRATH NORTH MULLIN & KRATZ
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
Tel: (402) 341-3070
Fax: (402) 341-0216

Attorneys for Defendant

Appendix L

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-6177

CHOLIER, INC.,

Plaintiff-Appellee,

v.

TORCH ENERGY ADVISORS, INC. and
Search Drilling Co.,

Defendants-Appellants.

- *1996 U.S. App. LEXIS 9518*

April 24, 1996.

JUDGES:

Before ANDERSON, TACHA, and BALDOCK, Circuit Judges.

OPINION BY:

STEPHEN H. ANDERSON

Appendix L

OPINION:

ORDER AND JUDGMENT*

Cholier, Inc. brought this diversity action against Torch Energy Advisors, Inc. ("Torch Energy") and Search Drilling Co. ("Search"), alleging claims for breach of contract and unjust enrichment, together with various related tort claims. At the close of Cholier's case in chief, the defendants (collectively "Torch") moved for judgment as a matter of law on all claims, at which time the district court granted the motion on all Cholier's tort claims except for the fraud claim. At the close of all the evidence, the court granted judgment as a matter of law on the fraud claim, and it submitted the claims for breach of contract and unjust enrichment to the jury. The jury found against Torch on the breach of contract claim. Torch appeals the district court's denial of its post verdict motion, pursuant to Fed.R.Civ.P. 50 and 59, for judgment as a matter of law or alternatively for a new trial on the contract claim. Torch contends that the evidence conclusively establishes that there was no agreement between the parties on essential contract terms and that, in any event, the damages evidence was too speculative and imprecise. Alternatively, Torch argues that the jury award of damages was against the weight of the evidence. We affirm the district court's denial of Torch's motion for judgment as a matter of law. We reverse the district court's judgment denying Torch

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

a new trial, and we remand and order a remittitur of damages, or a new trial on damages if Cholier refuses the remittitur, as set forth below.

BACKGROUND

Cholier is an Oklahoma company that provides consulting services to owners of oil and gas properties. Torch Energy is a Houston based company that manages oil and gas properties for investors. Search is a corporation purchased by Torch Energy that owned and operated oil and gas properties in Oklahoma.

This action involves Cholier's claim that it had an oral contract with Torch to settle certain natural gas take-or-pay claims which Search had against Northern Natural Gas Company ("Northern"), and that Torch breached that contract.[1] According to Cholier president Rick Cline, he and Dee Davis of Torch had numerous telephone conversations regarding Cholier's representing Torch in negotiations with Northern. Cline testified that during a telephone conversation on March 4, 1992, Davis hired Cholier, agreeing to pay Cholier 15% of the sums recovered, and agreeing to consider a higher fee based on the work involved. According to Cline's testimony, Davis said, "Rick, I can go ahead and agree to this [Cholier's representation] and the 15 percent rate," to which Cline said, "[T]hat's great. At the same time, I think there [are] sufficient things to be developed on the Search claim that I would like a higher percentage." Appellant's

[1] Northern purchased gas from Search wells under an agreement which obligated Northern to accept a certain quantity of gas or to pay for that quantity even if Northern did not accept it.

App., Vol. I at 196. In response to repeated questions, Cline consistently characterized the arrangement as a firm agreement based on a floor contingency fee of 15%, with an agreement to discuss a higher percentage once Torch reviewed Cholier's schedules. *Id.* at 198, 217, 223; Vol. II at 349.

As background to the March 4 conversation, Cline testified that the parties had already discussed the wells to be included, as those "that had been reserved by the FDIC." Vol. I at 194. In a letter confirming the telephone conversation, Cholier identified the wells to be included in the claim against Northern in an attached schedule which listed "certain wells that were originally included with Search." Cholier letter to Torch dated March 5, 1992, Vol. III at 1046; Vol. I at 204. According to the letter, Torch was to update the schedule to indicate any changes in ownership. Vol. III at 1046. Cline further testified that the contract was later confirmed in a conversation between him and Sue Ann Craddock of Torch, during which Craddock said, "Rick we've got a deal." Vol. I at 218. Cline stated that, thereafter, a Torch representative came to his office to review and copy his background work product, and that Torch then breached the contract by notifying Cholier that it would not be using Cholier's services, but would be negotiating with Northern on its own behalf.

As evidence of damages, Cholier presented an expert's testimony that Cholier would have been able to recover $859,325.86 for Torch from Northern.[2] Although Cholier

[2] Although this recovery figure is greater than the $550,000 which Torch was able to recover on its own, it represents the (Cont'd)

admitted that the parties never agreed on any fee beyond the 15% floor, it argued entitlement to damages based on a "reasonable fee" of 30% of $859,325.86. Vol. I at 217, 223; Vol III at 1012-13.

Torch characterizes the events differently. According to Torch, Cholier had merely made unsolicited proposals to which Torch never agreed, and, in any event, Cholier's own version of events indicated that there was no meeting of the minds on essential terms. Thus, Torch argues that Cline's testimony establishes that the parties never agreed on the price (*i.e.* the contingency fee percentage, or whether any fee was to be inclusive or exclusive of costs), that the wells to be included in *the* contract were not adequately identified (arguing, inter alia, that the schedule attached to Cholier's letter cannot suffice since it clearly included well interests which Torch no longer owned), and there was no time specified for Cholier's performance.

The jury found that Torch breached a contract with Cholier, and awarded Cholier $257,797.76 which equals 30% of Cholier's estimated recovery of $859,325.86. It made no findings on the unjust enrichment claim. Following the adverse verdict, Torch made a Rule 50 motion for judgment as a matter of law on the contract claim, together with an alternative motion for a new trial pursuant to Rule 59. Cholier

---

(Cont'd)

mathematical estimate of Cholier's expert as the amount Cholier would have been able to obtain. According to the expert, factors such as incorrect pricing data and failure to distinguish types of interests resulted in Torch's actual settlement being lower than Cholier would have been able to negotiate. Vol. II at 687-88.

opposed the motion, arguing that Torch was precluded from bringing it because Torch had failed to renew its original motion at the close of all the evidence. Cholier also contested on the merits.

Without explaining the basis for doing so, the district court rejected Cholier's waiver argument and found that Torch's motion should be considered on the merits. The court then denied the motion. On Torch's appeal from the district court's denial, Cholier continues its opposition based on waiver and the merits.

DISCUSSION

A. Preserving the Motion for Judgment as a Matter of Law Under Fed.R.Civ.P. 50

At the close of Cholier's evidence, Torch moved for judgment as a matter of law on all claims pursuant to Fed.R.Civ.P. 50. At the time of argument, the court specifically asked the parties to be brief, and the court also expressed a desire that the case finish that afternoon. Appellant's App., Vol. III at 796, 815. Following the lunch break, the district court granted the motion on all tort claims, except fraud, which the court inadvertently omitted, and the court denied the motion on the breach of contract claim and reserved its ruling on the unjust enrichment claim. *Id.* at 816-21. Torch then presented and rested its case that same afternoon.

After dismissing the jury for the day, the court held a dialogue in open court with the attorneys concerning

preparation of jury instructions. At that time Cholier's attorney advised the court that it had not ruled on the fraud issue contained in Torch's motion for a directed verdict. The court then reviewed its notes, granted the motion as to the fraud claim, and concluded, "So the issues in front of the Court and the parties and the jury are breach of contract or in the alternative quantum meru[i]t or the unjust enrichment theory." *Id.* at 991.

Subsequently, during the jury instruction conference the following Monday, Torch's counsel briefly referred to a renewed motion on the quantum meruit theory. Recalling that its ruling on that issue had been reserved, the court then denied the motion without hearing additional argument. *Id.* at 1005-06.

"[A] defendant's motion for directed verdict made at the close of the plaintiff's evidence is deemed waived if not renewed at the close of all the evidence. . . ." *Karns v. Emerson Elec. Co.,* 817 F.2d 1452, 1455 (10th Cir.1987).[3] In such instances, the defendant's failure to renew the motion not only bars the district court's subsequent consideration after the verdict, but also precludes our consideration on appeal. *Id.*

Torch argues that its situation is governed by *Trujillo v. Goodman,* 825 F.2d 1453, 1455-56 (10th Cir.1987), which approved a liberal construction for what constitutes a motion

[3] Fed.R.Civ.P. 50 currently employs the terminology "judgment as a matter of law" instead of "directed verdict" and "judgment notwithstanding the verdict," but the standards remain the same. *Id.* advisory committee's note to 1991 Amendment.

for a directed verdict. Thus, Torch contends that its renewed motion on the unjust enrichment claim suffices to preserve its right to bring the post verdict motion on all grounds. Alternatively, Torch argues that its situation is governed by *Armstrong v. Federal Nat'l Mortgage Ass'n,* 796 F.2d 366, 370 (10th Cir.1986), which held that failure to renew a motion at the close of all evidence would not constitute a waiver if the evidence introduced after the initial motion were brief and the court indicated that renewal would not be necessary to preserve the issues raised.

Cholier correctly counters that a motion under Rule 50 preserves only the grounds raised in that motion, and, moreover, the court's original unequivocal denial of the breach of contract issue does not indicate an intent to preserve the issue. *See First Sec. Bank v. Taylor,* 964 F.2d 1053, 1056-57 (10th Cir.1992); *Karns,* 817 F.2d at 1456.

However, Torch is also correct in noting that this court has "recognized that in satisfying the requirements of Rule 50, technical precision is unnecessary." *Anderson v. United Tel. Co.,* 933 F.2d 1500, 1503 (10th Cir.), *cert. denied,* 502 U.S. 940, 116 L. Ed. 2d 327, 112 S. Ct. 357 (1991). Accordingly, we review a directed verdict motion "in light of the purpose of the rules to secure a just, speedy, and inexpensive determination of a case." *Id.* Especially when, as in this case, the district court considered and rejected the waiver argument, we may conduct our own review of the record to determine whether there is an appropriate basis to sustain the court's action.[4]

[4] We may affirm on any grounds supported by the record. *United States v. Sandoval,* 29 F.3d 537, 542 n. 6 (10th Cir.1994).

As noted above, the record clearly demonstrates that Torch's Rule 50 motion was reopened at the close of all the evidence, at which time the court reviewed its notes, made additional rulings and expressly reiterated its decision on the full motion. Accordingly, under *Trujillo* and *Anderson,* the motion, in substance, was adequately renewed, considered, and preserved in its entirety for our review.

B. Ruling on the Motion for Judgment as a Matter of Law

We review de novo a district court's ruling on a motion for judgment as a matter of law, applying the same legal standard as the district court under Fed.R.Civ.P. 50. *Clark v. Brien,* 59 F.3d 1082, 1086 (10th Cir.1995), *cert. denied,* 133 L. Ed. 2d 747, 116 S.Ct. 800 (1996); *Thompson v. State Farm Fire & Casualty Co.,* 34 F.3d 932, 941 (10th Cir.1994). Thus, we construe the evidence and inferences most favorably to the nonmoving party, without weighing the evidence, passing on the credibility of witnesses, or substituting our judgment for that of the jury. *See Rajala v. Allied Corp.,* 919 F.2d 610, 615 (10th Cir.1990), *cert. denied,* 500 U.S. 905 (1991). However, "we must be guided by the requirements of the underlying cause of action." *Palmer v. City of Monticello,* 31 F.3d 1499, 1503 (10th Cir.1994).

Viewed in the light most favorable to Cholier, there was sufficient evidence to support a contract claim. That is, as previously set forth, Cholier's president Rick Cline testified that Torch representative Dee Davis hired his company in a telephone conversation on March 4, 1992, and that the agreed upon contract terms included a minimum 15% contingency fee, with increases subject to later negotiation, that the parties

had already discussed the wells to be included, which Cline generally identified in a confirmation letter which also included a schedule of wells which Torch was to update for current ownership, and that subsequently Torch representative Sue Ann Craddock confirmed to him that they had a deal. Appellant's App., Vol. I at 193-99, 204, 218.

Although Torch disputes these conversations and insists that the documentation supports its version of the facts, under the standards for Rule 50, the court must draw all inferences in favor of Cholier, and in favor of allowing the jury to resolve such disputes. Thus, the minimum terms of the alleged contract are not invalidated, as a matter of law, by the fact that the parties contemplated future negotiations to increase Cholier's compensation. That is, viewed in the light most favorable to Cholier, Cline's testimony could show acceptance as to those minimum terms, rather than a conditional acceptance or counter offer. Therefore, the parties' agreement to review certain terms at a later date would not necessarily void the minimum terms ab initio. Nor is the fact that Cholier was awaiting confirmation for the exact wells to be included fatal to finding a meeting of the minds, in light of Cline's testimony that the parties had agreed upon the parameters which would define the included wells. Finally, the fact that the contract contained no specified duration is not critical under Oklahoma law, inasmuch as its duration can be fairly implied from the contract's subject matter. *See R.S. Mikesell Assocs. v. Grand River Dam Auth.,* 627 F.2d 211, 212-13 (10th Cir.1980) (applying Oklahoma law). Accordingly, the district court did not err in finding sufficient evidence to warrant submission to the jury.

C. Motion for a New Trial Under Fed.R.Civ.P. 59

A finding of sufficient evidence to create a jury question under Rule 50 does not preclude a finding that the actual verdict rendered was against the weight of the evidence for purposes of Rule 59. *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 211 (3d Cir.1992), *cert. denied,* 507 U.S. 921, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993). Thus, when the verdict is clearly and decidedly against the weight of the evidence, a new trial is proper. *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir.1995), *cert. denied,* 116 S.Ct. 1017. Additionally, it is within the trial court's discretion to order a new trial on damages alone when the jury's award is speculative or excessive. *See Collier v. Hoisting & Portable Eng'rs Local Union No. 101,* 761 F.2d 600, 603 (10th Cir.1985). Moreover, in ruling on a motion for a new trial on grounds that damages are excessive, the trial court may order a remittitur, or alternatively a new trial if the plaintiff refuses the remittitur. *Klein v. Grynberg,* 44 F.3d 1497, 1507 (10th Cir.), *cert. denied,* 116 S.Ct. 58 (1995). In such cases, a motion for a new trial made on the grounds that the jury's verdict is against the weight of evidence usually presents a question of fact, rather than law, and is properly directed to the discretion of the trial court, which we review for manifest abuse. *Richardson v. City of Albuquerque,* 857 F.2d 727, 730 (10th Cir.1988).

However, as with a Rule 50 motion, the evidence must be considered in light of the requirements of the underlying cause of action. *See Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538 (5th Cir.1984) (approving order for a new trial where jury's verdict indicated a

misunderstanding and misapplication of damages applicable to breach of contract and fraud claims). Thus, where it is apparent that certain identifiable sums were improperly included in the jury's verdict, an order of remittitur is appropriate, with an alternative order for a new trial if the plaintiff refuses to accept the remittitur. *See Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 418 F.Supp. 1009, 1023 (D.N.J.1976), *rev'd on other grounds,* 570 F.2d 72 (3d Cir.1977), *cert. denied,* 436 U.S. 913 (1978).

Torch argues that there was no evidence to support the jury's specific award of a contingency fee amounting to 30% of the recovery that Cholier's expert calculated Cholier would have obtained had Cholier been permitted to perform the contract.[5] In response, Cholier contends that the general verdict form prevents us from knowing how the jury

---

[5] Torch also argues that Cholier's evidence on damages is so hopelessly flawed and insufficient that its use by the jury cannot be sustained. However, Torch challenged Cholier's expert during cross examination, and, apparently, the jury believed the expert's explanation as to the validity of her method. Torch further attacks the expert's estimate on other grounds, such as improperly included interests, but Torch failed to raise the argument below, and Torch points to nothing in the record which indicates it presented any evidence at trial to dispute the validity of such inclusions. Finally, Torch points to evidence that Cholier expended $216,000 in legal fees in settling its other clients' claims, and argues that the jury should have deducted that figure from Cholier's damages against Torch. However, Torch presented no evidence that would have allowed the jury to connect that expense with Cholier's recovery against Torch, and in fact, Torch appears to have resisted Cholier's efforts to relate the two in connection with its claimed damages against Torch. Appellant's App., Vol. I at 285-86.

calculated damages.[6] Cholier also counters that, in any event, the jury was justified in basing its verdict on a 30% contingency fee since there was evidence that such a fee is reasonable. However, this argument confuses Cholier's claim for breach of contract with Cholier's claim for unjust enrichment, and the cases cited by Cholier in support of the "reasonable value" of services figure are inapposite, as they concern contracts in which full performance has already been rendered.

Rather, Cholier's own citation of authority shows that: "In Oklahoma, the measure of damages for the breach of a contract of employment by the employer is *prima facie* the sum stipulated to be paid for the services." Appellee's Br. at 30 (quoting *Sharpless Separator Co. v. Gray,* 62 Okla. 73, 161 P. 1074 (Okla.1916) (construing a contract in which the breach occurred before plaintiff was allowed to perform)); *see also White v. American Law Book Co.,* 106 Okla. 166, 233 P. 426, 427 (Okla.1924) (limiting contingency fee recovery to amount named in the contract), *cited in* Appellee's Br. at 31.

Although Cholier claims that Torch agreed to consider a higher fee than the agreed upon "floor" of 15%, the evidence conclusively shows no further agreement was ever reached. Under Oklahoma law, that agreement to agree to more than

[6] We reject this argument outright. In fact, the damages are the exact amount urged by Cholier in its closing argument: "Therefore, you have only the figures of 30 percent from either side for a reasonable fee for contract between the parties. It is therefore straight mathematics to find the sum of $257,797.75 for Cholier's total damages in this case." Appellant's App., Vol. III at 1013.

the 15% fee is too vague to be enforceable.[7] *See American Automated Theatres, Inc. v. Hudgins, Thompson, Ball & Assocs.,* 516 P.2d 565, 567 (Okla.Ct.App.1973). Thus, in basing its damages award on the 30% figure, the jury impermissibly ignored its instructions that the damages for the breach of contract "cannot be contingent or speculative." Jury Instruction No. 18, Appellee's App., Tab 5. Accordingly, the district court manifestly abused its discretion in denying Torch's motion for a new trial.[8]

Since the extent of excess damages is clearly ascertainable, we remand with instructions that the court order a remittitur, with damages calculated on a 15% fee, to be awarded in the amount of $128,898.88, with the further order for a new trial on damages in the event Cholier refuses to accept the remittitur.

[7] Were it not for the evidence that the parties agreed on a floor contingency fee of 15%, we would necessarily find the whole contract unenforceable, thus warranting judgment for Torch under its Rule 50 motion. *See Dunn v. Dunn,* 391 P.2d 885, 887 (Okla.1964).

[8] Although Torch's notice of appeal indicated that it was appealing the separate judgment for attorney's fees which the district court granted Cholier as the prevailing party on a contract action under Okla. Stat. Ann. tit. 12, § 936 (West 1988), Torch made no arguments on the issue. However, in its own brief, Cholier requested attorney's fees on appeal, which request Torch countered in its reply brief. We agree with Torch that, inasmuch as the awarded damages were clearly excessive and improper, Cholier is not entitled to attorney's fees in this well-taken appeal.

Appendix L

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

ENTERED FOR THE COURT

Stephen H. Anderson

Circuit Judge

APPENDIX M — PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003 PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND FILED MAY 12, 2003 (R. A6514-6524)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., and JENNIE-O FOODS, INC., now known as JENNIE-O TURKEY STORE, INC.,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS,

Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003 PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND

Plaintiffs hereby respond to Defendant's "Motion to Amend Judgment Entered on April 9, 2003 Pursuant to Fed. R. Civ. P. 59(e) and to Set Amount of Supersedeas Bond" (the "Motion") and state as follows:

I. SWIFT-ECKRICH'S MOTION BELATEDLY SEEKS TO AMEND THE UNDERLYING JUDGMENT ON THE JURY'S VERDICT IN VIOLATION OF FED. R. CIV. P. 59(e).

Although Swift-Eckrich labeled its Motion as a Rule 59(e) motion to alter or amend the attorney fee judgment entered on April 9, 2003, the Motion must be denied, because it also belatedly seeks to amend the first judgment entered on the jury's verdict. Swift-Eckrich seeks to consolidate both judgments, and therefore both judgments necessarily will change.

Federal Rule of Civil Procedure 59(e) states that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Likewise, Rule 6(b) specifically prevents the Court from extending the time to file a Motion under Rule 59(e). Fed. R. Civ. P. 6(b) ("but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them"). The Court simply has no discretion to consider matters affecting the judgment after this ten day period has passed. 4B Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Proc.: Civil 3d*, § 1167 at 562-564 (3d ed. 2002); *see Collard v. United States*, 10 F.3d 718, 719 (10th Cir. 1993) ("A trial court may not extend, sua sponte or otherwise, the time for a party to

file a Rule 59(e) motion when it enters an amended judgment solely to award costs. Rule 6(b) expressly prohibits a trial court from extending the time to file such a motion."); *see also In re Home & Family, Inc.*, 85 F.3d 478 (10th Cir. 1996).

The parties agreed to a judgment on the jury verdict, and that judgment was filed on March 27, 2003. Swift-Eckrich filed a motion for remittitur or new trial on April 10, 2003. Swift-Eckrich did not raise the present issue in its April 10 Motion, and therefore the Court has no authority to alter the March 27, 2003 judgment, even if it also would be amending the April 9th judgment.

II. SWIFT-ECKRICH'S "RULE 59(e)" MOTION SEEKS NO RELIEF AVAILABLE UNDER THE RULES AND SHOULD BE DENIED.

Swift-Eckrich contends that the recent amendment to Rule 58(a)(1) eliminates the requirement that the attorney fee judgment be set forth on a separate document. But Swift-Eckrich misreads the rule. It only applies in conjunction with the filing of a motion for attorney fees, which did not occur in this case. Without such a motion, the "separate document" exception for attorney fee judgments does not apply.

Rule 58(a)(1) states as follows:

> (1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a *motion*:

* * * * * *

(C) for attorney fees under Rule 54;
(Emphasis supplied.)

The parties here *stipulated* "that judgment in the sum of $1,022,445 may be entered in favor of Plaintiffs and against Defendant as a reasonable attorney fee pursuant to 15 U.S.C. § 15." Rule 58(a)(1)(C) is simply inapplicable.

Likewise, Rule 58(c) makes clear that the Rule does not apply to attorney fee judgments unrelated to a motion for attorney fees. It states as follows:

(c) Cost or Fee Awards.

(1) Entry of judgment *may not be delayed*, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a *timely motion for attorney fees* is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59. (Emphasis supplied.)

There simply is no procedural device available to the Court which would allow the consolidation of the judgments. In fact, the Court properly entered judgment on the jury's verdict without awaiting resolution of the fee award, because

there was no motion for attorney fees pending. Nothing in the rules would allow the Court to re-open its first judgment to consolidate it with a second attorney fee judgment.

The Federal Circuit, as with all circuits, regularly addresses cases in which two judgments are entered, one on the merits and one on fees. The Federal Circuit, as with all circuits, will merely consolidate the appeals. Rule 3(b)(2), Fed. R. App. P.; *see also Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980). The court of appeals will not require separate briefing on the attorney fee judgment when Swift-Eckrich's sole contention is that if they prevail on appeal, Unitherm is not the prevailing party.

If Swift-Eckrich's Motion is construed as a Rule 59(e) Motion, the time for appeal has been stayed pursuant to Fed. R. App. P. 4(a)(4). The time for filing a notice of appeal on the two judgments would be different, therefore, only if the Court ruled upon the two pending motions at different times. If the Court resolves both motions at the same time, there will be no alleged complications in the scheduling on appeal - a single notice of appeal will suffice.[1] (Plaintiffs do not concede that the instant Motion is effective as a Rule 59(e) motion under Fed. R. App. P. 4(a)(4) to extend the time for appeal on the attorney fee judgment.)

---

[1] Indeed, the briefing on Defendant's first post-trial motion closed only recently. On April 30, 2003, Defendant filed a motion for leave to file a reply brief with reference to its first post-trial motion. The Court granted Defendant's motion for leave to reply and gave Defendant until May 7, 2003, to do so. Defendant filed its reply brief on that date.

The only other issue raised by Swift-Eckrich is the purported need to post two separate bonds.[2] There is simply no requirement under the Rules that two bonds be posted. Further, Plaintiffs do not object to the posting of a single supersedeas bond to cover both the damages judgment and the attorney fee judgment. Plaintiffs do, however, advise that the bond should also include the amount of $28,891.05 awarded on the agreed bill of costs.

Even if there was a lawful method to give Swift-Eckrich the result it seeks - and there isn't - it would not be a prudent judicial act. Swift-Eckrich contends, incorrectly, that an amended and consolidated judgment would serve the interests of judicial economy and procedural efficiency. Given the history of this litigation, one may justifiably be skeptical as to whether this is a serious concern of Swift-Eckrich. Swift-Eckrich argues that such an amendment will not prejudice the Plaintiffs. Nevertheless, it never contacted the Plaintiffs to determine whether Plaintiffs object to the consolidation of the judgments. This set of affairs is at least puzzling and is a sufficient grounds for the Court and Plaintiffs to question the motives for filing this Motion as a Rule 59(e) Motion.

Plaintiffs submit there is a risk that entering an amended and consolidated judgment would actually complicate the procedure before both this Court and the Federal Circuit. By seeking an amended judgment, Swift-Eckrich may be

[2] This apparent afterthought by Defendant is even more puzzling in view of its statement on the *first* page of its motion that, "Defendant proposes to post *a supersedeas bond* in the amount of the damages award plus $1,022,445 (the amount of the stipulated attorney fee award)." (Emphasis supplied.)

attempting to give itself another bite at the apple regarding its post-trial motions. Swift-Eckrich may well believe the entry of an amended judgment consolidating the two judgments in this case will "restart the clock" on its post-trial motions. The law surrounding amended judgments - and when and if additional post-trial motions may be filed when such judgments are entered - invites controversy. The case law is unclear on when alterations to judgments are treated as substantive. *See Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) (altered judgment is a new judgment with new periods of time to file post-trial motions); *see also McNabola v. Chicago Transit Authority*, 10 F.3d 501, 520-21 (7th Cir. 1993), *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1064-66 (7th Cir. 1992). Non-substantive alterations to judgments ordinarily do not restart the clock. *See FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212, 73 S. Ct. 245, 248-249 (1952) ("[T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought."); *Blue Mt. Invs., Ltd. v. Bone*, 100 F.3d 967 (unpublished disposition) 1996 WL 658101 (10th Cir. Nov. 13, 1996) (non-substantive amendments do not toll deadlines); *Offshore Prod. Contractors, Inc. v. Republic Underwriters Ins. Co.*, 910 F.2d 224, 229 (5th Cir. 1990) (amendment tolls deadline only where it "has disturbed legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality"). But Plaintiffs submit that confusion on this point should not be invited as Swift-Eckrich suggests. If Swift-Eckrich attempted to file new motions under Rules 50 or 59 ten days after the entry of an amended judgment, both this Court and ultimately the

Federal Circuit would have to resolve whether such motions are allowed. This will not simplify the issues or procedure in this case.

III. PLAINTIFFS DO NOT OBJECT TO THE ENTRY OF A SUPERSEDEAS BOND IN THE AMOUNT OF $19,052,336.05.

Notwithstanding ConAgra Foods' $27.6 billion in sales for 2002,[3] Rule 62 requires Swift-Eckrich to post a bond to stay execution on the judgments in this case. Fed. R. Civ. P. 62. The appeal in this case will likely be time-consuming and Plaintiffs are not required to rely upon Swift-Eckrich's continued viability as a business in the present economic and corporate climate to secure its judgments. Plaintiffs do not object to the entry of a supersedeas bond in the amount of $19,052,336.05 (i.e., judgment of $18,000,000, judgment of $1,022,445, and costs award of $29,891.05).

IV. SUMMARY.

Swift-Eckrich's Motion requests a result that is not allowed under the Federal Rules of Civil Procedure. Even if such a result was allowable, it would inject confusion into a situation where no confusion currently exists. Swift-Eckrich's Rule 59(e) Motion should be denied.

Plaintiffs do not object to Swift-Eckrich posting a supersedeas bond in the amount of $19,052,336.05.

---

[3] Swift-Eckrich's Brief contains an apparent clerical error in that it relates its sales in 2002 as being only $27.6 million.

Dated: May 12, 2003

Respectfully submitted,

s/ Greg A. Castro
Burck Bailey, OBA # 415
Greg A. Castro, OBA # 11787
Jay P. Walters, OBA # 17364
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820
Telephone: (405) 232-0621
Facsimile: (405) 232-9659

-and-

Dennis D. Brown, OBA #13662
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
321 South Boston, Suite 800
Tulsa, OK 74103-3318
Telephone: (918) 599-0621
Facsimile: (918) 583-9659

Attorneys for Plaintiffs

APPENDIX N — ORDER (RE DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003, PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND FILED MAY 23, 2003 (R. A6525-6528)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC.,
an Illinois corporation; and
JENNIE-O FOODS, INC.,
a Minnesota corporation,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

ORDER

Before the Court is Defendant's "Motion to Amend Judgment Entered on April 9, 2003, Pursuant to Fed. R. Civ. P. 59(e) and to Set Amount of Supersedeas Bond." Plaintiffs filed a Response and the matter is now at issue.

Appendix N

Defendant requests the Court to enter an Amended Judgment combining the March 27, 2003, merits judgment with the April 9, 2003, judgment reflecting the stipulated attorneys' fees award. According to Defendant, entering a combined judgment will promote judicial economy and convenience because it will allow the matter to proceed to the Federal Circuit as a single appeal. Defendant argues' that because of the pending Motion for Remittitur, the appeal on the attorneys' fees issue will be due before the merits appeal. Defendant asserts that the filing of a single judgment will save time and effort by both the parties and the appellate court.

Plaintiffs object, arguing Defendant's proposal creates a plethora of problems. First, Plaintiffs argue because Defendant's request would require the Court to modify the March 27 judgment, the request is untimely since it was not made within 10 days of entry of that judgment. Plaintiffs also argue that no change will occur in the appeal process if a single judgment is entered. According to Plaintiffs, if things remain as they are, the Federal Circuit will simply consolidate the two appeals and they will proceed as a single event. Plaintiffs also note that Defendant's attorneys' fees appeal is based solely on Plaintiffs not being a prevailing party and therefore will be resolved entirely by the ruling on the merits appeal. Finally, Plaintiffs express concern that Defendant's true intent is to reopen the post-trial motion process. Plaintiffs argue that if a new judgment is entered, the time limits for filing post-trial motions will be reopened and then this Court and the appellate court will have to deal with the additional issues raised as a result.

Appendix N

Plaintiffs' argument with regard to the timeliness of the motion is well taken. The amendment sought by Defendant would in fact have the effect of altering the Court's March 27 judgment. Because the present motion was not filed until April 23, 2003, it was not timely as to the March judgment. The ten-day limit set by Fed. R. Civ. P. 59 is jurisdictional and cannot be altered by the Court. *See* Fed. R. Civ. P. 6(b):

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Accordingly, the Court is without power to consider Defendant's request and it will be denied.

Even had Defendant timely filed the motion it would be denied. The Court fails to see how creating a single judgment would result in any savings in the time and effort of either the appellate court or the parties. Indeed, as Plaintiffs note, this situation is fairly routine as; more often than not, the issue of attorneys' fees is not resolved until well after judgment on the merits is entered.

Defendant also requests the Court to set any supersedeas bond at $19,022,445.00. Defendant argues that there is no need for any bond as they clearly have the assets to satisfy the judgment. Plaintiffs do not object to the proposed bond amount but argue that Defendant should be required to post the bond.

Appendix N

The Court agrees that although Defendant currently has adequate assets to satisfy any judgment, there is no certainty that its financial condition will remain the same. Accordingly, if Defendant seeks a stay pending appeal, a supersedeas bond in the agreed amount must be posted.

As set forth more fully herein, Defendant's Motion to Amend Judgment Entered on April 9, 2003, Pursuant to Fed. R. Civ. P. 59(e) and to Set Amount of Supersedeas Bond is DENIED in part and GRANTED in part. Defendant's request to amend the judgment is denied. The Court sets the amount of the supersedeas bond at $19,022,445.00.

IT IS SO ORDERED this 23rd day of May, 2003.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX O — ORDER (DENYING DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD ON ANTITRUST COUNT, OR, IN THE ALTERNATIVE FOR NEW TRIAL ON ANTITRUST DAMAGES) FILED JUNE 4, 2003 (R. A6529-6531)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC.,
an Illinois corporation; and
JENNIE-O FOODS, INC.,
a Minnesota corporation,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

ORDER

Before the Court is Defendant Swift-Ekrich's Motion for Remittitur Reducing Damage Award on Antitrust Count, or, in the Alternative for New Trial on Antitrust Damages Plaintiffs filed a Response, to which Defendant filed a Reply. The matter is now at issue.

Appendix O

Pursuant to Fed. R. Civ. P. 59(e), Defendant requests the Court to enter a remittitur reducing the antitrust damages awarded to Plaintiffs from $6 million to $2 million. Defendant further requests that in the event Plaintiffs reject the remittitur, the Court grant its alternative motion for a new trial on the amount of antitrust damages.

Defendant's motion must fail because Defendant has failed to demonstrate any inconsistency or error in the verdict. Defendant's argument is premised on the fact that the evidence on damages did not distinguish between the alternative claims for relief and therefore the damage award for each claim, should have been identical. However, Defendant's argument ignores the fact that the jury instructions permitted consideration of differing parts of the testimony in determining the proper amount of damages for each claim. Under the instructions as given to the jury, damages on the antitrust claim could be awarded for lost profits caused by Defendant's conduct and for any loss of market share caused by the conduct. On the other hand, damages on the intentional interference claim were to be measured only by the amount of money that would compensate Plaintiffs for the loss of the economic relationship. Clearly, the instructions permitted the jury to award damages for a greater spectrum of injury on the antitrust claim. Thus, it was entirely possible for the jury to have awarded a significantly larger figure for the antitrust claim. "When reviewing claims that a jury verdict is inconsistent, we must accept any reasonable view of the case that makes the jury's answers consistent." *Patton v. TIC United Corp.*, 77 F.3d 1235, 1241 (10th Cir. 1996) (citing Palmer v. City of Monticello, 31 F.3d 1499, 1505 (10th Cir. 1994)).

Appendix O

Defendant's argument is limited to the alleged inconsistency of the verdict. Defendant does not assert the $6 million award was not supported by the evidence. Indeed, Plaintiffs offered evidence demonstrating a much larger amount of damages. "It is within the virtually exclusive purview of the jury to evaluate credibility and fix damages." *United Int'l Holdings Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1230 (10th Cir. 2000). Accordingly, there is no basis to reduce the jury's award.

In the absence of any evidence demonstrating the verdict is the result of a manifest error of law, and considering that the jury's verdict can be reconciled with the evidence and the instructions, the Court finds Defendant Swift-Ekrich's Motion for Remittitur Reducing Damage Award on Antitrust Count, or, in the Alternative for new Trial on Antitrust Damages should be and is DENIED.

IT IS SO ORDERED this 4th day of June, 2003.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX P — COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC, SUBMITTED BY PLAINTIFFS-APPELLEES UNITHERM FOOD SYSTEMS, INC. AND JENNIE-O FOODS, INC. FILED JULY 26, 2004

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1472,-1473

UNITHERM FOOD SYSTEMS, INC.
and JENNIE-O FOODS, INC.,

Plaintiffs-Appellees,

v.

SWIFT-ECKRICH, INC.
(doing business as ConAgra Refrigerated Foods),

Defendant-Appellant.

Appeals from the United States District Court for the Western District of Oklahoma in Case No. 01-CV-347, Chief Judge Robin J. Cauthron

COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC, SUBMITTED BY PLAINTIFFS-APPELLEES UNITHERM FOOD SYSTEMS, INC. AND JENNIE-O FOODS, INC.

Appendix P

STATEMENT OF COUNSEL REQUIRED IN FEDERAL CIRCUIT RULE 35(b)

Based on my professional judgment, I believe the Panel Decision is contrary to the precedent of the Tenth Circuit Court of Appeals: *Cummings v. General Motors Corp.*, 365 F.3d 944 (10th Cir. 2004).

Based on my professional judgment, I believe the Panel Decision is contrary to the precedent of this Court: *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098 (Fed. Cir. 2003).

Based on my professional judgment, I believe the Panel Decision is contrary to the precedent of the Tenth Circuit Court of Appeals: *Telecor Communs., Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002).

Burck Bailey
Attorney of Record for Plaintiffs/Appellees

THE POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL OF THE COURT

1. The point of *law* overlooked or misapprehended by the Panel of the Court is: The law of the Tenth Circuit and the law of the Federal Circuit require a party to move for judgment as a matter of law under Rule 50(a) in order to preserve an issue for appellate review on the ground of sufficiency of the evidence.

Appendix P

2. The point of *fact* overlooked or misapprehended by the Panel of the Court is: ConAgra did not, in any manner whatsoever, make a Rule 50(a) motion, either pre-verdict or post-verdict, on the issues of relevant market or antitrust injury.

3. The point of *fact* overlooked or misapprehended by the Panel of the Court is: Unitherm presented ample evidence for the jury to determine the relevant market and antitrust injury.

THE ARGUMENT IN SUPPORT OF REHEARING AND REHEARING EN BANC

The Panel vacated the jury's verdict in favor of Unitherm on the antitrust claim and remanded for a new trial' on the ground of the sufficiency of the evidence of relevant market and antitrust injury. ConAgra never raised any contention of sufficiency of the evidence in the trial court as to the issues of relevant market and antitrust injury by a Rule 50(a) motion. Under longstanding, as well as very recent, Tenth Circuit and Federal Circuit law, the failure to make a Rule 50(a) motion in the trial court bars appellate review of these issues. Further, Unitherm presented ample evidence of the relevant market and antitrust injury, and the Panel misapprehended both the facts and the applicable Tenth Circuit law regarding these issues. Consideration of the Panel's Decision by the full Court is necessary to secure and maintain the uniformity of this Court's decisions. Fed. R. App. P. 35(b)(1)(A).

Appendix P

I. CONAGRA WAIVED ITS SUFFICIENCY OF THE EVIDENCE ISSUES AND THE PANEL MISAPPREHENDED BOTH THE FACTS AND THE LAW WITH REFERENCE TO THESE ISSUES.

The Panel Opinion ignores well-established and highly important rules of trial procedure. The trial court was reversed for a ruling it did not make and was never asked to make.

The Panel (Op., p.42, n.7) applied Tenth Circuit law and stated that the failure of a party to move for JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence "provided, *as is the case here*, that the party made *the appropriate motion* prior to the submission of the case to the jury. *See Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 950-51 (10th Cir. 2004)." (Emphasis added). Contrary to the Panel's observation, ConAgra *did not* make the appropriate motion prior to the submission of the case to the jury to challenge Unitherm's definition of the relevant market or Unitherm's proof of antitrust injury. (A5232-5239, 5884).

The *only* statement ConAgra's counsel made with reference to Unitherm's antitrust claim was to express his doubt about the sufficiency of the evidence to prove an intent to deceive the patent office: "Well, now the plaintiff is now in, or plaintiffs' case is now in, and I realize that intent can be inferred but it has to be inferred from something and I don't believe there's evidence here that would permit that

Appendix P

inference."[1] (A5237). Not a word was uttered about the issues of relevant market or antitrust injury.

The Tenth Circuit law set forth in *Cummings* is squarely opposite the conclusion reached by the Panel. The Tenth Circuit held that the moving party must *specify* the basis for its motion:

> In this case, the Cummings moved for judgment as a matter of law with regard to the defense of misuse only and requested a jury instruction on this issue. Counsel did not move for judgment as a matter of law with regard to GM's liability generally . . . . Although technical precision is not required, *the moving party must adequately notify the court of the issues being raised in order to satisfy the purposes of the rule. The Plaintiffs' motion was limited to a motion for judgment as a matter of law on the issue of misuse, and therefore any appeal is so limited.*

365 F.3d at 950 (emphasis added).

The Tenth Circuit stated the reasons for this rule of law:

> A motion under Rule 50(a) protects the Seventh Amendment right to trial by jury. Such a motion alerts the opposing party to any deficiencies in the case, thereby giving the party an opportunity

---

[1] Even as to fraudulent intent the comment by ConAgra's counsel was not a specification of "law and the facts on which the moving party is entitled to judgment" as required by Rule 50(a).

to rectify any deficiencies prior to the case being submitted to the jury. A motion for judgment as a matter of law also alerts the court to a claim of insufficient evidence before the case is submitted to the jury so the court is not faced with such a claim after the fact when the court's ability to address the motion is limited. Finally, a motion at the close of evidence preserves the issue as a question of law for appeal.

* * * *

The motion must include *all issues challenged*, as the "failure to move for a directed verdict [now judgment as a matter of law] *on a particular issue will bar appellate review of that issue*."

Id. at 949 (emphasis added; citation omitted).[2]

Moreover, regardless of whether Tenth Circuit or Federal Circuit law is applied here, the result is the same. The very Federal Circuit case cited by the Panel in its Opinion (p.42, n.7), *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098 (Fed. Cir. 2003), stands for exactly the same rule of law stated in *Cummings*, *i.e.*, the failure to raise sufficiency

[2] *See also United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, (10th Cir. 2000), where judgment was entered in favor of plaintiff for $125,000,000. On appeal, Wharf contended the evidence at trial was insufficient to sustain the compensatory damages award of $67,000,000. The Tenth Circuit held the argument was waived because Wharf did not specifically raise the issue in its motion for directed verdict at the close of the evidence. *Id.* at 1228-29.

of the evidence regarding an issue by JMOL constitutes a waiver. Duro-Last filed a *post-verdict* motion contesting sufficiency of the evidence on obviousness. But Duro-Last did not include obviousness in its *pre-verdict* motion for JMOL.

> Custom Seal asserts that Duro-Last waived its right to file a post-verdict JMOL motion on obviousness because its pre-verdict JMOL motion raised only the issues of inequitable conduct and the on-sale bar.

Id. at 1106.

The *Duro-Last* court held that a Rule 50(a) motion pre-verdict must *specifically* raise the issue, and cannot be raised, for the first time, post-verdict:

> The requirement for specificity is not simply the rule-drafter's choice of phrasing. In view of the litigant's Seventh Amendment rights, it would be constitutionally impermissible for the district court to re-examine the jury's verdict and to enter JMOL on grounds not raised in the pre-verdict JMOL.
>
> * * * *
>
> Duro-Last's JMOL at the close of evidence clearly raised only the inequitable conduct and on-sale bar issues. Since a post-trial motion for JMOL can be granted only on grounds advanced in the pre-

> verdict motion, Duro-Last was precluded from making a post-trial motion under Rule 50(b) for JMOL that its patents were not invalid for obviousness . . . .

Id. at 1106, 1108.

ConAgra's complaints about sufficiency of the evidence on the issues of relevant market and antitrust injury were raised for the first time on appeal. ConAgra did not alert Unitherm or Judge Cauthron to these purported deficiencies at the time Unitherm had an opportunity to rectify them. ConAgra's failure to comply with Rule 50(a) perpetrated unfairness on Unitherm and on the trial court. Thus, the Panel's Opinion finding that ConAgra did not waive its sufficiency of the evidence issues, when ConAgra utterly failed to raise them in the trial court, cannot be squared with Tenth Circuit law or with this Court's recent pronouncement of the law in *Duro-Last*.[3]

[3] Notably, ConAgra also never raised an issue of technical substitution as opposed to economic substitution, in either its Opening Brief or its Reply Brief. Unitherm was not put on notice that this concept was at issue when it was preparing its Answer Brief and designating portions of the record for appeal. Unitherm was prejudiced not only by the omission of any pertinent motion in the trial court, but also the omission of any such argument in ConAgra's briefs in the appellate court.

II. THE PANEL MISAPPREHENDED THE LAW AND THE FACTS REGARDING THE RELEVANT MARKET AND ANTITRUST INJURY.

The Panel's statement that, "ConAgra's inability to attract any licensees is indicative of a lack of pricing power, *the* single most important element in defining a relevant antitrust market" (Op., p.40, emphasis in original), misses the economic reality in this case and misstates Tenth Circuit law. When ConAgra fraudulently obtained its patent, it sought to impose a massive price increase of 10¢ a pound, which it knew that no one could possibly pay. (A3603). ConAgra set the royalty unreasonably high for the very purpose of restricting output. ConAgra did not want any takers, it wanted others to go away. The fact that other food processors did not license the patent is evidence of successful monopolization, not the other way around. And, there is the irony that ConAgra purported to offer a license only to non-infringers, but it sent its letters only to those who *had* infringed. (A4483-84, 4487-91, 3748-59). Thus, by definition, a license was not being offered to Jennie-O, the entity ConAgra sued for infringement.[4]

By the Panel's logic, as long as a patentee raises prices so high that no one can afford to buy the patented process, there is no "pricing power" and thus no relevant market. This

[4] The Tenth Circuit has defined "market power" as "*either* the power to control prices *or* the power to exclude competition." *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 966 (10th Cir. 1990)(Tenth Circuit's emphasis). The standard identified by the Panel relating to "market power" is, in fact, the standard for "monopoly power," which is *not* an element of a Section 2 attempt to monopolize.

results in bizarre public policy. The holder of the patent monopoly can, by establishing a price so high no one can reasonably pay it, insulate itself from antitrust liability. There will be no "transaction" in the market and, *ipse dixit*, there is no market.

In December of 1996, Unitherm sent letters to ConAgra and Jennie-O discussing the economic benefit of the Unitherm/patented process as compared to the conventional batch process which the industry was using at the time. (A4754-55, 3728-29). At an operating rate of 112,000 pounds of product per day (*i.e.*, 7000 pounds per hour at 16 hours per day), the economic benefit of the patented process is $6000 per day. *Id.* This translates into 5.35¢ a pound. The economic significance of this benefit and the impact and importance of the patented process in the industry are thus readily apparent in light of the unrefuted testimony of Jennie-O's president that "the food industry in general . . . is a business of pennies" and that Jennie-O's overall company-wide profit in the year prior to trial was only about 3¢ a pound. (A3603).

By the time the industry began converting to the patented process and ConAgra filed its bogus patent application, there clearly would have been considerable price elasticity of demand had ConAgra offered a reasonable royalty. A royalty of 10% of the gross economic benefit of the process would be about a half cent per pound and would be equivalent to about 18% of Jennie-O's average overall profit margin of 3¢ a pound. A royalty of 20% of the gross economic benefit would be about 1¢ a pound. But even a demand for 20% of the process's impressive economic benefit was not enough

for ConAgra's true purpose. ConAgra demanded a royalty amounting to almost twice the economic benefit of the process and more than three times Jennie-O's average margin on all products. The jury clearly understood the import of the testimony of Jeffrey Ettinger, the President of Jennie-O, that "to have to pay 10-cent-a-pound royalty on a product line makes you very uncompetitive very quickly." (A3603). At Jennie-O's production rate, their royalty payment to ConAgra would have been $1.8 Million a year, escalated annually over many years. (A3600, 3602).

Contrary to the Panel's Opinion (p.39), the record evidence shows that there are no reasonable substitutes and that the process provides very large, real economic benefits. In fact, the record is filled with evidence that the patented process significantly increases product yield (typically by at least 4%), reduces labor costs, increases production capacity, reduces chilling costs, reduces heat input into the product, reduces injection requirements, improves product safety, and increases product shelf life. (*See, e.g.*, A3350-52, 3464-65, 3504-06, 3728-29, 4384, 4386, 4396, 4402-09, 4472, 4709-25, 4754-55, 5132-33). These benefits are all acknowledged by ConAgra in the patent itself. (*See, e.g.*, Add. 31, Col.2:16-36,47-50 and Add. 34-35).

Moreover, Mike Benson, who is Jennie-O's vice president of R&D and is responsible for food safety (A3502), testified that Jennie-O could *not go back to using the batch process if it were required to stop using the Unitherm process* "because of the added food safety risk. In 1999 the [USDA, Food Safety Inspection Service] FSIS published a guideline for the cooling of products and the control of temperature in

the products, and the old process would not meet their guidelines without significantly altering the product." (A3505-06).

The record also shows that caramelization and deep frying are not acceptable substitutes for the patented process. ConAgra explains in the patent that the consumer demand is for wholesome, healthful, nutritional products which are *not fried* and which are low in fat and have the look, taste, and texture of their home-cooked counterparts. (Add. 31, Col. 1:19-26 and Col. 2:36-44).

> There are numerous drawbacks to deep-frying foods . . . . They include a residual oily flavor and mouthful, as well as adverse characterization of the product as being a high fat product, because of the oil that remains embedded in the product's surface. Moreover, the oil can degrade over time, thereby affecting the product's shelf life and taste.

(Add. 31, Col. 1:44-50).[5]

Concerning the caramelization process, Syed Hussain admitted that it does not produce a golden-brown product. (A3280). Arnold Mikelberg, former President of Swift-Eckrich also testified that caramelization will not produce a golden-brown color. Rather, the product has a dull muddy color and does not have a crispy appearance. (A3354-55).

[5] Additional record cites also support that there in fact were no acceptable substitutes. (*See* Add. 31, Col.1:19-26, Col.1:27-31, Col.1:44-50, Col.2:36-44; A3280, 3339-44, 3354-55, 3669-70, 4220, 5133-34, 5172).

Consistent with ConAgra's claims and admissions in the patent, Mikelberg also testified that the Unitherm process produces an excellent product which is richer in color than ConAgra's prior Jonesboro product. (A3354). As stated by Bob Wood, Jennie-O's Senior VP of Operations, the product from the Unitherm process *is* the premium product. (A3586). Even ConAgra's own counsel acknowledged that the batch process is an old fashioned and inefficient process. (A5177).

ConAgra got a patent on a cost-saving process which gave ConAgra a huge economic advantage over its rivals. Obviously, ConAgra did not charge itself the oppressive royalty. ConAgra controlled the relevant market, a market with no economic substitutes, and used its illegally-acquired monopoly to put its rivals in the sale of the process, including Unitherm, out of the browning line business.

However, rather than granting Unitherm and the jury the benefit of any reasonable economic inference based upon the record as a whole, the Panel isolated certain testimony and drew inferences in favor of ConAgra that these are merely "technological" facts without any economic consequences. This is not the proper standard of review. *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1073 (10th Cir. 2002). It is undeniable that these facts have economic consequences from which reasonable inferences about the market may be drawn. As the Panel noted, "Market definition and antitrust injury . . . are intensely factual determinations." (Op., p.11). These issues were left by the trial court to the jury pursuant to instructions that were not objected to by ConAgra.

In addition, the Panel mistakenly opined, "Mangum explicitly testified that, to the best of his knowledge, there has never been a transaction in *his* proposed relevant market." (Op., p. 40; emphasis supplied). Not so. Mangum merely testified that a different, hypothetical market conjured up by ConAgra's counsel did not exist.

> Q. Well, how could there be harm to a market that doesn't exist?
>
> A. I said the market *you described* doesn't exist. I've described a market that very much exists. (Emphasis supplied).

(A5154). Mangum testified:

> The relevant market, or the relevant antitrust market in this case, I've determined, is a process for browning precooked whole muscle products by coating with a browning agent and applying sufficient heat to brown the product without substantial shrinkage. The embodiment of this process in this case is a browning line oven system.

(A5132). In fact, Mangum testified that there were transactions in the relevant market. (A5152, 5154-55).

More importantly, the Panel itself identified numerous transactions in the market when it affirmed invalidity of the Patent under § 102:

> Unitherm also submitted evidence that, prior to the critical date of May 11, 1997, it had sold both its RapidFlow ovens and the process that it had been demonstrating. In addition to its 1995 sale to Jennie-O, Unitherm proved sales to Thorn Apple in 1995 and to Hudson Foods in 1996. Unitherm further proved that Plantation ordered a Unitherm system on February 7, 1997 and that Foster Farms ordered a system and made its first payment by May 9, 1997. Jennie-O's Robert Wood testified that the process that Jennie-O purchased from Unitherm "was able to prepare the surface, apply liquid smoke and set liquid smoke." The demonstrations to ConAgra alone suggest that ConAgra was aware of the Unitherm process for at least several years prior to the critical date.
>
> * * *
>
> Unitherm's sale of both product and process to Hudson was among the district court's key undisputed prior sales.

(Op., pp. 19, 21).

Further, the Panel misapprehended Mangum's testimony by confusing the market for processes with a market for food products, a confusion perpetrated unsuccessfully by ConAgra at trial. The Panel stated:

> [Mangum] also, however, concluded that pre-cooked turkeys prepared using the patented

> process competed with pre-cooked turkeys not prepared by the patented process at the retail level, but somehow not at the wholesale level. [Mangum] never explained this seeming anomaly.

(Op., p.39).

But Mangum expressly testified "there are no food products in the relevant market." (A5167, 5172). Of course, pre-cooked turkey produced by the patented process competes with tuna salad at the retail level. But, consumers of food products are not customers or potential customers for the patented process. A food processor could not compete on equal footing with ConAgra in producing the precooked, whole muscle, golden-brown turkey product to the wholesale trade if it was foreclosed from receiving the cost and yield benefits of the patented process.

Unitherm's proof fit precisely into the concept outlined by the Tenth Circuit in *Telecor Communs., Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002). Southwestern Bell argued that the market "should be evaluated from the viewpoint of the end-user of the phone services and should therefore include both pay phones and cell phones, which Southwestern Bell argued were reasonably interchangeable at the end-user level." *Id.* at 1129. In rejecting this definition of the relevant market, the Tenth Circuit implicitly rejected the definition urged by ConAgra, *i.e.*, that the market is to be tested at the consumer level. Instead, the Tenth Circuit held the relevant market was a location-owner level, *i.e.*, the equivalent of the market for the patented process, where ConAgra's anti-competitive behavior took place and where price was raised and output reduced.

> Location owners are the relevant customers for purposes of locating Southwestern Bell's pay phone facilities, and from the location owners' perspective cellular phone services and pay phone services are not interchangeable.

Id. at 1136.

A reasonable inference is likewise available here: From the perspective of food processors, the batch process is not interchangeable with the patented process. From an economic perspective, the batch process is not a reasonable substitute for the patented process. The *Telecor* court stated: "It is well settled that defining the relevant market is an issue of fact." *Id.* 1131. In the case at bar, the jury had ample evidence of the absence of reasonable substitutes for the Unitherm (patented) process.

Further, the injury to Unitherm was not merely damage to a single competitor. It was injury across the market inflicted upon any competitor intending to sell a system for performing the process or any purchaser wanting to employ the process using a Unitherm system or a system from another supplier. (A5139-40). ConAgra's actions affected a market in an anti-competitive way. *That* is antitrust injury.

Appendix P

III. CONCLUSION

Based upon the foregoing, this Court should grant a rehearing or rehearing en banc and reinstate the judgment in favor of Unitherm on its antitrust claim.

Burck Bailey
Greg A. Castro
Jay P. Walters
Fellers, Snider, Blankenship,
Bailey & Tippens
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820
Telephone: (405) 232-0621
Facsimile: (405) 232-9659

Dennis D. Brown
Fellers, Snider, Blankenship,
Bailey & Tippens
321 South Boston, Suite 800
Tulsa, OK 74103-3318
Telephone: (918) 599-0621
Facsimile: (918) 583-9659

Attorneys for Plaintiffs-Appellees Unitherm Food Systems, Inc. and Jennie-O Foods, Inc.

APPENDIX Q — EXCERPTS FROM CONAGRA'S MOTION FOR SUMMARY JUDGMENT FILED FEBRUARY 11, 2002 (R. A0248-0252)

* * *

V. UNITHERM'S ANTITRUST CLAIM SHOULD BE DISMISSED BECAUSE UNITHERM IS NOT A COMPETITOR OF SWIFT-ECKRICH.

Unitherm cannot succeed on its antitrust claims against Swift-Eckrich because it is not a competitor of Swift-Eckrich. *Associated Gen. Contractors*, 459 U.S. at 539. Unitherm identifies the relevant market as "**the market for sliceable cooked turkey products** sold in interstate commerce throughout the entire United States." (First Amended Complaint, ¶ 149, Exhibit 1) (emphasis added).[4] However, unlike Swift-Eckrich, Unitherm is not in the business of producing "sliceable cooked turkey products;" it sells ovens. In fact, Unitherm has admitted that it does not compete with Swift-Eckrich:

> Q: Now, you're not com-- you don't compete with Swift-Eckrich, do you?
>
> A: No.
>
> Q: You sell ovens and they sell food; right?
>
> A: That's correct.

(Howard Depo., 128:19-23, Exhibit 3).

[4] In response to Interrogatory No. 12, Exhibit 2, Jennie-O identifies the relevant market as "the market for browning and/or smoking precooked (typically cooed 'in-bag') whole muscle turkey products sold in interstate commerce throughout the United States."

Appendix Q

The Supreme Court requires a "determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated Gen. Contractors*, 459 U.S. at 534-35 & n.31. In analyzing whether the plaintiff has antitrust standing, the Supreme Court examined whether the plaintiff is a consumer or a competitor in the relevant market. *See Associated Gen. Contractors*, 459 U.S. at 539 (denying antitrust standing to party that was "neither a consumer nor a competitor in the market in which trade was restrained"). The Circuit Courts of Appeal, following this mandate, limit standing to competitors and consumers. *See Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 967 (9th Cir. 1999) (plaintiffs cannot "avoid the fundamental requirement for antitrust standing that he or she have suffered an injury of the type -- almost exclusively suffered by consumers or, competitors -- that the antitrust laws were intended to prevent"); *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 44-45 (1st Cir. 1995) (a competitor or a consumer in the "relevant market" is "the presumptively 'proper' plaintiff"); *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597-599 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 042 (1996) ("'An appropriate balance [between deterrence and excessive damages] is achieved by granting standing only to those who, as consumers or competitors, suffer immediate injures . . .'"); *Int'l Raw Materials Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, 1328-29 (3th Cir. 1992) (denying standing to a soda ash operator because the operator was neither a consumer nor a competitor in the sale of soda ash); *S.D. Collectibles, Inc. v. Plough, Inc.* 952 F.2d 211, 213 (8th Cir. 1991) ("The antitrust laws were designed to protect competition and therefore standing is generally limited to actual market participants, that is, competitors or

Appendix Q

consumers"); *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1183 (5th Cir. 1988) ("Restraint in the market affects consumers: and competitors in the market; as such, they are the parties that have standing to sue").

Some courts reject claims of plaintiffs who are neither competitors nor consumers in the market on the basis that the plaintiff cannot show an antitrust injury, which is an essential element of standings.[5] *See Automated Salvage Transp., Inc. v. Wheelabrator Envtl Sys., Inc.*, 155 F.3d 59, 65 (2nd Cir. 1998) ("The requirement that the alleged injury [to plaintiff] be related to anti-competitive behavior requires, as a corollary, that the **injured party be a participant in the same market** as the alleged malefactors") (emphasis added) (*citing Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985)); *Serfecz*, 67 F.3d at 599.

Other courts reject the antitrust claim of a plaintiff, who is neither a competitor nor a consumer, on the grounds that the plaintiff cannot state a claim for unlawful monopolization under § 2 of the Sherman Act.[6] Unlawful monopolization

[5] Tenth Circuit holds that to maintain standing to bring an antitrust claim under the Clayton Act, a private plaintiff must show (1) an antitrust injury, and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws. *Sports Racing Servs., Inc. v. Sports Car Club of Am.*, 131 F.3d 874, 882 (10th Cir. 1997).

[6] Section 1 of the Sherman Act requires the existence of a contract, combination or conspiracy that unreasonably restrains trade. The First Amended Complaint, however, does not allege such facts. Swift-Eckrich, therefore, assumes that Plaintiffs allege a violation of § 2, not § 1, of the Sherman Act.

requires existence of monopoly power and anticompetitive conduct. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1353 (Fed. Cir. 1999) (*citing* Phillip E. Areeda & Herbert Hovernkamp, *Antitrust Law*, § 650a, at 66 (1996). In order to be actionable, anticompetitive "conduct must be directed toward competitors and must be intended to injure competition." *Intergraph*, 195 F.3d at 1353 (emphasis added). *See Ad-Vantage Te. Dir. Consult. v. GTE Directories*, 849 F.2d 1336, 1348 (11th Cir. 1987) ("In order to demonstrate 'an area of effective competition' one must establish a competitive relationship"); *Orthopedic Studio, Inc. v. Health Ins. Plan*, 1996 U.S. Dist. LEXIS 10321, at *14 (E.D.N.Y. Feb 9, 1996) ("Because the plaintiff and HIP are not competitors in the relevant market . . . the plaintiff cannot allege a claim under Section 2 of the Sherman Act.").

Whether couched as an inability to demonstrate antitrust standing, antitrust injury[7] or anticompetitive conduct, the fact that Unitherm is not a competitor of Swift-Eckrich (or a consumer in the relevant market)[8] is fatal to Unitherm's antitrust claims.

---

[7] "Antitrust standing and its terminological cousin, antitrust jury, are often confused. Both concepts, however, share a common ingredient, 'confin[ing] recovery to those who have been injured by restraint on competitive forces in the economy." *Triple M Roofing Corp. v. Tremco, Inc.*, 753 F.2d 242, 247 (2nd Cir. 1985). *See also Sharp v. United Airlines, Inc.*, 967 F.2d 404, 406 (10th Cir. 1992).

[8] Unitherm does not allege that it is a consumer of sliceable hooked turkey breasts. Nor does Unitherm allege that consumers of sliceable cooked turkeys breasts have been damaged by Swift-Eckrich's alleged anticompetitive acts.

Nor can Unitherm create standing, and thus avoid summary judgment, by claiming that it is a supplier to Jennie-O and other competitors of Swift-Eckrich. Standing has been denied to antitrust plaintiffs that were merely suppliers to the defendant's competitors. *See SAS of Puerto Rico, Inc.*, 48 F.3d at 44-45 ("In general . . , a supplier . . . is held not to have suffered 'antitrust injury,'" explaining that supplier's customer "is the immediate victim and the preferred plaintiff"); *Serfecz*, 67 F.3d at 597 ("suppliers to direct market participants typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect to be considered 'antitrust injuries'"); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 186-89 (2nd Cir. 1970) (standing denied to plaintiff that licensed information and supplied ingredients to competitor of alleged monopolist); *Razin v. Bluff Cross & Blue Shield of Kate*, 635 F. Supp. 1287, 1318 (D. Kan. 1986), *affd*, 899 F.2d 951 (10th Cir.), *cert. denied.* 497 U.S. 1005 (1990) (physician not allowed to attack defendants impairing the patronage of a hospital at which he practiced). *See also* Phillip E: Areeda & Herbert Hovernkarmp, *Antitrust Law.* § 375d (1995) (antitrust victims' suppliers generally lack antitrust standing, unless she competes with the defendant).

Since Unitherm does not compete with Swift-Eckrich in the relevant market, it cannot maintain an antitrust claim against Swift-Eckrich. Therefore, the court should grant Swift-Eckrich's motion for summary judgment on Unitherm's Eleventh and Twelfth Causes of Action.

* * * *

APPENDIX R — EXCERPTS FROM COURT'S ORDER ON SUMMARY JUDGMENT MOTIONS FILED AUGUST 10, 2002 (R. A2693-2695)

* * *

B. Defendant's Motion for Summary Judgment

1. Antitrust Violations

Defendant argues that the two Plaintiffs' antitrust claims cannot succeed for different reasons: 1) Unitherm is not a competitor of the Defendant in the market for sliceable cooked turkey products; and 2) Jennie-O cannot show any antitrust injury as a result of any action of the Defendant. The Court agrees only with the later and discusses each argument separately below.

a. Unitherm

The Sherman Act § 2 states, in relevant part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."

15 U.S.C. § 2.

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or

development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

The Clayton Act states, in relevant part:

> "[A]ny person who shall be injured in his business . . . by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount ,in controversy, and shall recover threefold the damages by him sustained. . . ."

15 U.S.C. § 15.

ConAgra argues that Unitherm cannot succeed on its antitrust claims because Unitherm is not a competitor of ConAgra and thus has no antitrust standing. The Court finds that the law is not as ConAgra argues it to be.

In Walker Process Equip. v. Food Mach. & Cheat. Corp., 382 U.S. 172 (1965), the Supreme Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the: other elements necessary to a § 2 case arc present. In such event the treble damage provisions of § 4 of the Clayton Act would be available to an injured party." *Id.* at 174.

ConAgra denies that it is a competitor of Unitherm, claiming that ConAgra processes meat while Unitherm sells ovens. But, it is undisputed that ConAgra offer; a browning/ smoking process at a royalty of 10¢ per pound and Unitherm offered its browning/smoking process for sale as early as

Appendix R

1993. And ConAgra's own documents previously produced in this action also support the conclusion that ConAgra is a competitor of Unitherm and that ConAgra is enforcing its patent.

> Others in the industry may approach your company regarding this patent, and we would appreciate it if you would inform them that we intend to aggressively protect all of Our rights under this patent.

Plaintiffs' Brief in Opposition, Exhibit 9 (Letters from ConAgra to 15 prospective purchasers of the Unitherm system).

This Court has already found the reference to "others in the industry" sufficient to put Unitherm under apprehension of a lawsuit for patent infringement -- something which has since come to fruition with the filing of ConAgra's counterclaim. The fact that ConAgra has asserted a counterclaim for patent infringement on an antitrust claim a viable one. *Walker Process*, 382 U.S. 172. The issue yet to be decided is whether ConAgra fraudulently obtained the patent. *See Walker Process, supra.* Thus, the Court finds that the undisputed facts are sufficient to withstand the motion for summary judgment on Unitherm's antitrust claims.[3]

* * * *

[3] Because the Court has upheld Unitherm's antitrust causes of action under federal law, a discussion of the Oklahoma Antitrust Reform Act ("OARA") 79 Okla. Stat. § 205, is unnecessary. *See* 79 Okla. Stat. § 212 ("[OARA] shall be interpreted in a manner consistent with Federal Antitrust Law, 15 U.S.C. § 1, *et seq.* and the case law applicable thereto").

APPENDIX S — EXCERPTS FROM CONAGRA'S TRIAL BRIEF FILED MARCH 3, 2003 (R. A3092-3096)

* * *

B. Even If Unitherm Shows That The '027 Patent Was Obtained By Fraud, It Nevertheless Cannot Prove Violation Of The Antitrust Laws.[3]

Section 2 of the Sherman Act provides, in pertinent part: "Every person who shall monopolize or attempt to monopolize . . . any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2 (2002).

> The four elements necessary to establish an attempt to monopolize claim are: '(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt.'

TV Comms. Network. Inc. v. Turner Network Television. Inc., 964 F.2d 1022, 1025 (10th Cir. 1992), cert. denied, 121 L. Ed. 2d 537, 113 S. Ct. 601 (1992), *quoting Colorado Interstate Gas Co. v. Natural Gas Pipeline*, 885 F.2d 683, 693 (10th Cir. 1998), cert denied, 112 L.Ed. 2d 424, 111 S. Ct. 441 (1990).

[3] By Order dated August 19, 2002, the Court determined that a separate assessment of the issues under the Oklahoma Antitrust Reform Act is unnecessary because that statute is to be interpreted in a manner consistent with Federal Antitrust Law. Thus, for the sake of brevity, the discussion here sets forth only the standards under the Sherman Act.

"The key inquiry involves the power of the defendant in the market in which it competes," and if the plaintiff cannot "establish the existence of a relevant market and the defendant's power in that market," the claim fails as a matter of law. *See TV Comm. Network*, at 1025-26 (Rule 12 motion granted because plaintiff's alleged market is defective as a matter of law"); *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 368 (10th Cir. 1993). Thus, "to establish Section 2 violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant market." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1026 (10th Cir. 2002); *Brown Shoe Co. v. United States*, 370 U.S. 294, 342 (1962). A definition of the relevant market is essential because "without a definition of the market there is no way to measure (the defendant's) ability to lessen or destroy competition." *Walker Process*, 382 U.S. at 177; *Spectrum Sports v. McQuillan*, 506 U.S. 447 (1993).

C. Unitherm's Definition Of The Relevant Product Market Is Fatally Flawed.

According to Unitherm, the relevant antitrust market in this case is "the process for browning precooked, whole muscle meat products by coating with a browning agent and apply sufficient heat to brown the product without substantial meat shrinkage." (Mangum Report, p. 6.) Unitherm cannot prevail on antitrust claims premised upon this market definition.

The "relevant market" analysis has two elements: (1) "relevant product market," i.e. the cluster of products or processes with which the defendant's product or service

effectively competes; and (2) "relevant geographic market." *See Brown Shoe*, 370 U.S. at 324. The relevant product .process market must be defined by considering two factors: (1) reasonable "interchangeability of use," i.e., the extent to which the defendant's product is interchangeable in use with alternative products; and (2) "cross-elasticity of demand" between the product itself and substitutes for it. *Brown Shoe*, 370 U.S. at 325.

"Interchangeability of use" refers to "products which are reasonably interchangeable by consumers for the same purposes." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887 (10th Cir. 1991). If purchasers can substitute the processes for one another, the processes are most likely within a single product market. *Id.*; *U.S. v. E.I. du Pont de Nemours*, 351 U.S. 377, 380 (1956); *Hayden Pub. Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 71 (2d Cir. 1984) (product market includes describe "those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business away from each other"); *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430 (3rd Cir. 1997) (test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes).

"Cross-elasticity of demand" requires refers to the extent to which consumers will change their demand for one product in response to a price change in another. *See Eastman Kodak v. Image Technical Servs.*, 504 U.S. 451, 469 (1992).

Appendix S

1. *There is No Market For The '027 Golden Brown Process.*

A market definition must reflect the reality of the market. *See Alcatel USA, Inc. v. DGI Tech., Inc.*, 166 F.3d 772 (5th Cir. 1999). In order to establish the existence of a relevant product market, "evidence must be offered demonstrating . . . where consumers currently purchase the product [and] where consumers could turn for alternative products or sources of the product if a competitor raises prices." *Lantec*, 306 F.3d at 1026. When the defendant has no sales in the market as defined by plaintiff, such a market is defined too narrowly. *See Clark v. Flow Measurement*, 948 F. Supp. 519 (D.S. Carolina 1996) ("even more telling to the determination of relevant market is the fact that the specialized markets listed by the plaintiffs represent no sales from Flow Measurement since it was created.").

Here, Unitherm cannot prove the existence of a market for the '027 golden brown process because it has no evidence of any consumer ***demand*** for the process. No one ever agreed to take a license from Swift-Eckrich for the process -- in other words, Swift-Eckrich has no sales in the purported product market, thereby indicating that the plaintiff has defined the market too narrowly. ***Cross-elasticity of demand*** obviously cannot be determined when there was no demand at all, where no willing purchaser or licensee would pay money for the process, and where the price of the process would, therefore, be zero. Accordingly, Unitherm cannot prevail on its antitrust claims based in the product market it has defined.

Appendix S

2. *If A Product Market Exists At All, Then It Must Include All Commercially Available Browning Processes.*

A relevant product market must consist of something more than the sale of single product to a single customer. *Smalley & Co.*, 13 F.3d at 368; *TV Comms. Network, Inc.*, 964 F.2d at 1025-26 (relevant market as defined was insufficient as a matter of law where TVCN alleged that TNT attempted to monopolize the market for the TNT channel; "a claim cannot lie against [the defendant] for monopolization of its own product"); *see also Colsa Corp. v. Martin Marietta Services, Inc.*, 133 F.3d 853 (11th Cir. 1998) (dismissing plaintiff's antitrust claim because the market defined based solely on defendant's product, a contract, was too narrow).

Here, Unitherm cannot prove the existence of a product market that consists of one player (Swift-Eckrich) with one product (the '027 golden brown process) and zero sales. Unitherm's overly narrow definition of the market is further evidenced by the fact that it has ignored at least five processes that are (and have been for many years) "reasonably interchangeable" with the '027 process for browning whole muscle meat products. Swift-Eckrich will show that any relevant product market for browning processes must include at least five well-known, interchangeable alternatives: (1) oil browning, (2) caramel browning, and (3) smoke-house browning, as well as (4) browning processes that are similar to the '027 process but which produces a product of a color other than "golden brown" (e.g., a "brown" or "roasted" color), and finally, (5) the commercially acceptable alternative of not browning the product at all.

Appendix S

If all of these alternatives are considered and the product market given an appropriately broad definition, Unitherm cannot possibly show that Swift-Eckrich's obtaining the '027 patent (which has now been invalidated) has given it market power, much less a dangerous probability of success of monopolization. *Steuer and Latham, P.A. v. Nat'l Med. Enters., Inc.*, 672 F. Supp. 1489, 1504 (D.S.C. 1987) (market power means the "ability to injure consumers by curtailing output and raising prices"). The mere existence of the '027 patent does not "establish a presumption of market power in the antitrust sense," particularly given the number of substitute processes available to meat processors. *See Abbott Labs. v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991); *CSU, L.L.C. v. Xerox*, 203 F.3d 1322, 1325 (Fed. Cir. 2000); U.S. Department Of Justice And Federal Trade Comm, *Antitrust Guidelines For The Licensing Of Intellectual Property*, § 2.2 (April 6, 1995). ("although the intellectual property right confers the power to exclude with respect to the specific product, process or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power").

Unitherm's suggestion that Swift-Eckrich was on the brink of exercising domination in a market for turkey browning processes is simply absurd. Between the time the patent issued in 1999 and the time it was invalidated in 2002, Swift-Eckrich failed totally in its efforts to license the '027 process.

* * * *

APPENDIX T — EXCERPTS FROM TRIAL TRANSCRIPT DATED MARCH 14, 2003 (R. A4699-4700)

[Commencing at page 925]

* * *

(THE JURY WAS EXCUSED FROM THE COURTROOM, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: Uhm, counsel are not in yet. I have seen them milling around outside. You all are welcome to stay but you need to clean off your tables.

MR. SCHROEDER: Your Honor, may I ask if we will have an opportunity to argue motions at the conclusion of the [926] plaintiffs' case?

THE COURT: Well, of course I have to give you your opportunity to make those motions. What argument I give you will probably depend on whether I think I need argument.

MR. SCHROEDER: Thank you.

THE COURT: Or whether you're likely to win. I'll certainly allow everybody to argue if I think you're going to prevail, and I can almost anticipate what your arguments are going to be at this point. I don't normally need argument, is the short answer, but I never know from time to time.

MR. SCHROEDER: Thank you, Your Honor.

Appendix T

THE COURT: Is there anything from counsel in this case before we're in recess? No?

MR. CASTRO: No, Your Honor.

THE COURT: We're in recess. Counsel are excused.

(THE EVENING RECESS WAS TAKEN)

(PLEASE REFER TO VOLUME VI)

* * * *

APPENDIX U — FEDERAL RULE OF CIVIL PROCEDURE 59

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

(3)

Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

No. 04-597

IN THE

Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT ECKRICH, INC. d/b/a
CONAGRA REFRIGERATED FOODS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONER

BURCK BAILEY
Counsel of Record
GREG A. CASTRO
JAY P. WALTERS
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102-8820
(405) 232-0621

DENNIS D. BROWN
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
321 S. Boston, Suite 800
Tulsa, OK 74103-3318
(918) 599-0621

Attorneys for Petitioner

194386

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59.

LIST OF PARTIES

The Petitioner herein, Plaintiff-Appellee below, is Unitherm Food Systems, Inc., a corporation organized and existing under the laws of the State of Illinois. An additional Plaintiff in the United States District Court for the Western District of Oklahoma was Jennie-O Foods, Inc., now known as Jennie-O Turkey Store, Inc. As Jennie-O's direct interest in this matter related only to the lower court's ruling on patent invalidity, and the validity of the patent is not implicated by the question presented, Jennie-O has no direct interest herein.

The Respondent, Defendant-Appellant below, is Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Foods.

RULE 29.6 STATEMENT

The Petitioner has no parent and there are no publicly held companies that hold any stock of the Petitioner. Although not a Petitioner herein, Jennie-O Foods, Inc. (now known as Jennie-O Turkey Store, Inc.) is a wholly owned subsidiary of Hormel Foods Corporation, a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vi
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
RULES INVOLVED	1
STATEMENT OF THE CASE	1
1. Proceedings In The District Court	2
2. Proceedings Before The Federal Circuit	6
3. The Circuits Are Split On Appellate Review Of Sufficiency Of The Evidence When A Party Fails To Present A Post-Verdict Rule 50(b) Motion	10
SUMMARY OF THE ARGUMENT	12

Contents

Page

ARGUMENT 13

I. THERE CAN BE NO APPELLATE REVIEW OF SUFFICIENCY OF THE EVIDENCE IN THE ABSENCE OF A POST-VERDICT MOTION FOR JUDGMENT AS A MATTER OF LAW 13

A. Previous Decisions Of This Court Strongly Suggest That A Post-Verdict Motion For JMOL Is Mandatory For Appellate Review Of Sufficiency Of The Evidence 13

B. Requiring A Rule 50(b) Motion For Appellate Review Of The Evidence Serves The Purposes Of The Rule 19

II. SUFFICIENCY OF THE EVIDENCE ARGUMENTS MAY ONLY BE RAISED BY MOTION FOR JUDGMENT AS A MATTER OF LAW, NOT BY MOTION FOR NEW TRIAL. 27

III. THE "EXTENT" TO WHICH AN APPELLATE COURT MAY REVIEW SUFFICIENCY OF THE EVIDENCE IN THE ABSENCE OF A POST-VERDICT MOTION FOR JMOL IS EITHER NONE AT ALL, OR FOR "PLAIN ERROR" UNDER A MANIFEST INJUSTICE STANDARD. 29

Contents

Page

A. Standard of Review 29

B. The Jury's Verdict In This Case Is Supported By More Than Sufficient Evidence And Is Not Subject To A Finding Of Plain Error 33

IV. THIS COURT SHOULD CORRECT THE FEDERAL CIRCUIT'S PATENTLY ERRONEOUS IDENTIFICATION OF A PRE-VERDICT MOTION FOR JMOL THAT CONAGRA NEVER MADE. 38

CONCLUSION 40

TABLE OF CITED AUTHORITIES

CASES: *Page*

Adames v. Perez, 331 F.3d 508 (5th Cir. 2003) 10

Allied Chem. Corp. v. Diaflon, Inc., 449 U.S. 33 (1980) 28

Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984) 30

Benner v. Nationwide Mut. Ins. Co., 93 F.3d 1228 (4th Cir. 1996) 11

Berry v. United States, 312 U.S. 450 (1941) 19

Biodex v. Loredan Biomedical, Inc., 946 F.2d 850 (Fed. Cir. 1991) ..... *passim*

Brenner v. World Boxing Council, 675 F.2d 445 (2nd Cir. 1982) 31

Coffman v. Trickey, 884 F.2d 1057 (8th Cir. 1989) ... 22

Colonial Lincoln-Mercury v. Musgrave, 749 F.2d 1092 (4th Cir. 1984) 26

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 13, 14, 40

Cummings v. Gen. Motors Corp., 365 F.3d 944 (10th Cir. 2004) 7, 10, 11, 39

Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999) ... 39

Cited Authorities

Page

Dixon v. Montgomery Ward, 783 F.2d 55 (6th Cir. 1986) 11, 14, 30

Douglas County Bank & Trust Co. v. United Fin., Inc., 207 F.3d 473 (8th Cir. 2000) 28

Duro-Last, Inc. v. Custom Seal, Inc., 321 F.3d 1098 (Fed. Cir. 2003) 7

Eaddy v. Yancey, 317 F.3d 914 (8th Cir. 2003) 29, 30

Flannery v. President & Directors of Georgetown Coll., 679 F.2d 960 (D.C. Cir. 1982) 26

Fratta v. Grace Line, Inc., 139 F.2d 743 (2d Cir. 1943) 25, 26

Johnson v. New York, New Haven & Hartford R.R. Co., 344 U.S. 48 (1952) 14, 16, 22, 24

Johnson v. United States, 520 U.S. 461 (1997) 32

Karns v. Emerson Elec. Co., 817 F.2d 1452 (10th Cir. 1987) 30

Lama v. Borras, 16 F.3d 473 (1st Cir. 1994) 28

Lyons v. Jefferson Bank & Trust, 994 F.2d 716 (10th Cir. 1993) 39

Macsenti v. Becker, 237 F.3d 1223 (10th Cir. 2001) .. 23

Cited Authorities

	Page
Marbled Murrelet v. Babbit, 83 F.3d 1060 (9th Cir. 1996)	23
McEwen v. City of Norman, 926 F.2d 1539 (10th Cir. 1991)	30
Meloff v. New York Life Ins. Co., 240 F.3d 138 (2d Cir. 2001)	19, 20
Menefield v. Borg, 881 F.2d 696 (9th Cir. 1989)	21
Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940)	19, 26, 28
Morrison Knudsen Corp, v. Firemen's Fund Ins. Co., 175 F.3d 1221 (10th Cir. 1999)	11
Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967)	16, 17, 18
Nobelpharma AB v. Implant Innovations, 141 F.3d 1059 (Fed. Cir. 1998)	7
Ortiz v. Greyhound Corp., 192 F. Supp. 903 (D. Md. 1959)	21, 26
Otten v. Stonewall Ins. Co., 538 F.2d 210 (8th Cir. 1976)	19
Patel v. Penman, 103 F.3d 868 (9th Cir. 1996)	10
Patton v. Texas & Pac. Ry. Co., 179 U.S. 658 (1901)	21

Cited Authorities

	Page
Phillips v. Hillcrest Med. Ctr., 244 F.3d 790 (10th Cir. 2001)	30
Polys v. Trans-Colorado Airlines, Inc., 941 F.2d 1404 (10th Cir. 1991)	30
Poynter by Poynter v. Ratcliff, 874 F.2d 219 (4th Cir. 1989)	28
Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)	8, 24, 33, 36, 39
Royal Maccabees Life Ins. Co. v. Choren, 393 F.3d 1175 (10th Cir. 2005)	30
Selle v. Gibb, 567 F. Supp. 1173 (N.D. Ill. 1983)	26
Tennant v. Peoria & P.U. R.R. Co., 321 U.S. 29 (1944)	24
United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731 (D.C. Cir. 1998)	20
United States v. Olano, 507 U.S. 725 (1993)	31, 32, 33
Varda, Inc. v. Ins. Co. of N. Am., 45 F.3d 634 (2d Cir. 1995)	10
Velazquez v. Figueroa-Gomez, 996 F.2d 425 (1st Cir. 1993)	10, 28, 29, 30
Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965)	4, 5, 6, 8

Page

Weisgram v. Marley Co., 528 U.S. 440 (2000) 17, 18, 28, 29

Woods v. Nat'l Life & Acc. Ins. Co., 347 F.2d 760 (3d Cir. 1965) 11, 16

Zachar v. Lee, 363 F.3d 70 (1st Cir. 2004) 11

STATUTES:

SHERMAN ANTITRUST ACT § 2, 15 U.S.C. § 2 ..... *passim*

15 U.S.C. § 15 5

28 U.S.C. § 1254(1) 1

35 U.S.C. § 102(b) 4

RULES:

Fed. Cir. R. 30 ..... 2, 24

Fed. R. App. P. 30 24

Fed. R. Civ. P. 1 19

Fed. R. Civ. P. 50 ..... 1, 4, 5, 9, 19

Fed. R. Civ. P. 50(a) ..... i, 4, 5, 6, 13, 38

Fed. R. Civ. P. 50(b) ..... *passim*

Fed. R. Civ. P. 50(c) 18

Fed. R. Civ. P. 50(d) 18

Page

Fed. R. Civ. P. 51 32

Fed. R. Civ. P. 51(d)(2) 32

Fed. R. Civ. P. 59 ..... i, 1, 2, 12, 17, 27, 28

Fed. R. Civ. P. 59(e) 5, 6

Fed. R. Crim. P. 52(b) 31

Fed. R. Evid. § 5043 (1977) 31

OTHER AUTHORITIES:

9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 50.05[6] (3d ed. 2004) 20

9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 50.41 (3d ed. 2003) 11

9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 51.42 (3d. ed. 2004) 31

9A CHARLES A. WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521 (2d ed. 1995) 26

9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524 (1995) 20

9A CHARLES A. WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2533 (2d ed. 1995 & Supp.) 26

Cited Authorities

	Page
9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed. 1994)	30
21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 5043 (1977)	31
ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2004 (2005)	25
Armistead M. Dobie, *Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261 (1939).	27
OFFICE OF HUM RES. & STATS., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD: RECENT TRENDS (2002)	25

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, reported at 375 F.3d 1341, is set out at pages 1a-54a of the Appendix to the Petition for Writ of Certiorari ("Pet. App.").

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on July 12, 2004, and timely petitions for rehearing and rehearing *en banc* were denied on September 14, 2004. The Petition for a Writ of Certiorari was filed on November 2, 2004, and was granted on February 28, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 50, Federal Rules of Civil Procedure, is reproduced at Pet. App. 57a - 60a. Rule 59, Federal Rules of Civil Procedure, is reproduced at Joint Appendix ("J.A.") 155a-156a.

STATEMENT OF THE CASE

The federal circuit courts of appeals are presently divided as to whether a federal appellate court may review a jury's verdict for the sufficiency of the evidence when the issues raised on appeal were not first submitted to the consideration of the trial court in a post-verdict motion for judgment as a matter of law ("JMOL") under Rule 50(b) of the Federal Rules of Civil Procedure. ConAgra failed to file a post-verdict motion challenging the sufficiency of the evidence under Rule 50(b). ConAgra also failed to file a motion for new trial contesting the sufficiency of the evidence under Rule 59.

As ConAgra failed thereby to preserve these issues for appeal, the Federal Circuit's reversal was erroneous and this Court should affirm the trial court's judgment in favor of Unitherm.

1. Proceedings In The District Court

Unitherm Food Systems, Inc., ("Unitherm"), a manufacturer and supplier of equipment and processes used in the food industry sued Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Foods, ("ConAgra") in the United States District Court for the Western District of Oklahoma alleging, *inter alia*, attempt to monopolize in violation of Section 2 of the SHERMAN ANTITRUST ACT (a *Walker Process* claim), tortious interference with prospective business relations and fraud under Oklahoma common law, and declaratory judgment for invalidity of a patent that had been issued to ConAgra. (First Amended Complaint, R. A0163-0206).[1]

On September 14, 1999, the United States Patent and Trademark Office ("Patent Office") issued to ConAgra U.S. Patent No. 5,952,027 ("the '027 Patent"), entitled "METHOD FOR BROWNING PRECOOKED, WHOLE MUSCLE MEAT PRODUCTS." (R. A0006-11). However, the process claimed in the '027 Patent is identical to a browning process which Unitherm had invented ("Unitherm Process") and which had already been on sale and in public use since the early 1990's. As discussed in the '027 Patent, the process provides a method for browning precooked turkey breasts and similar precooked meat products that is far superior to the conventional "batch house" method and other methods of browning precooked meats. (R. A0007). The process is much faster, more economical, and capable of compliance with new, more stringent government food safety requirements. It also provides significantly increased product yield and produces the taste, texture and color desired by consumers. (R. A0007-08).

In February, 2000, following the issuance of the '027 Patent, ConAgra publicized its new patent by sending threatening letters

[1] Citations to the Record ("R.") are to the appendix submitted to the Federal Circuit pursuant to Federal Circuit Rule 30.

to manufacturers of equipment that could be used to perform the process.[2] In late February and March, 2000, ConAgra sent threatening letters to seven turkey breast vendors, all of whom had purchased or been solicited to purchase the Unitherm Process. (R. A4217-19, 4471, 4473, 4475-76, 4479-80, 4494-95, 4504, 4799-4809). In July 2000, ConAgra again sent letters to the trade regarding its patent, this time offering to license the patent at a royalty of 10¢ per pound, but only, "to all responsible parties who have not infringed these patents."[3] (R. A3748-59, 4481, 4483-84, 4487-91).

Unitherm filed a Motion for Partial Summary Judgment seeking a declaration that the '027 Patent is invalid. (R. A0923-71). In its Motion, Unitherm argued and provided evidence demonstrating that the process claimed in the '027 Patent is identical to the Unitherm Process and that Unitherm had demonstrated the Unitherm Process to ConAgra and the named inventor, ConAgra employee Prem Singh, on numerous occasions prior to ConAgra filing its application for the '027 Patent. ConAgra did not disclose Unitherm or the Unitherm Process to the Patent Office in its application.

The trial court found that the invention claimed in the '027 Patent and the Unitherm Process are the same. (R. A2686, 2692-93). It held that ConAgra's Patent is invalid under 35 U.S.C. § 102(b), because the process claimed had been both

[2] These letters, dated February, 2000, described the patented process and then stated: "Others in the industry may approach your company regarding this patent, and we would appreciate it if you would inform them that we intend to aggressively protect all of our rights under this patent." (R. A4472, 4474, 4478, 4482).

[3] Unitherm introduced evidence that the competitive nature of the meat industry provided a margin of only pennies per pound and that ConAgra's offer to license at 10¢ per pound, which was never accepted by any company, was a mere ruse to prevent all others from using the process. (R. A3601-06, 3586-87).

on-sale and in public use in the United States more than one year prior to the date the patent application was filed. (R. A2692-93). The court left for jury determination the question of whether ConAgra had obtained the patent by committing fraud on the Patent Office, the essential first element of a *Walker Process* antitrust claim. (R. A2693). *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965).

At trial, the court empaneled an eight-person jury that included four people with Masters Degrees and another who held a Ph.D. (R. A3125-30). Following the presentation of Unitherm's evidence, ConAgra's counsel made an oral motion for JMOL under Fed. R. Civ. P. 50(a). (J.A. 15a-22a).[4] ConAgra's motion addressed Unitherm's common law fraud cause of action and to a lesser extent whether there were sufficient customer relations to support the tortious interference count. (*Id.*). ConAgra's motion addressed the *Walker Process* cause of action, but only to the following extent:[5]

> Well, now the plaintiff is now in, or plaintiffs' case is now in, and I realize that intent can be inferred but it has to be inferred from something and I don't believe there's evidence here that would permit that inference.

(J.A. 21a). The motion contained no reference to relevant market, antitrust injury, intent to monopolize or dangerous probability of success of monopolization. ConAgra renewed the motion at the

[4] ConAgra's counsel characterized his motion as being for "a directed verdict" (J.A. 15a, 17a), but this distinction is not material. The 1991 amendments to Rule 50 changed the terminology in the rule from "directed verdict" and "judgment notwithstanding the verdict" to "judgment as a matter of law." Fed. R. Civ. P. 50, 1991 Notes of Advisory Committee. A party's error in using the former terminology "is merely formal." *Id.*

[5] Proof that ConAgra obtained the patent by fraud on the Patent Office was also an element of Unitherm's claim for tortious interference under Oklahoma common law.

conclusion of the evidence without further comment. (J.A. 22a). ConAgra never mentioned the word "antitrust" or any element thereof in its Rule 50(a) motion.

Following eight days of trial, the jury returned a verdict in favor of Unitherm on the *Walker Process* claim in the sum of $6,000,000. (J.A. 23a-24a). The trial court thereafter trebled this amount pursuant to 15 U.S.C. § 15. (J.A. 27a-28a). The court also entered a stipulated attorney fee judgment in the amount of $1,022,445. (J.A. 33a). The jury also returned a verdict in favor of Unitherm for compensatory damages on the tortious interference count in the sum of $2,000,000, plus $2,000,000 in punitive damages.[6] (J.A. 24a-26a). The jury found in ConAgra's favor on Unitherm's common law fraud claim. (J.A. 24a).

ConAgra did not file a motion for JMOL pursuant to Rule 50(b) following the jury verdict or the judgment. ConAgra filed a pleading entitled, "Motion for Remittitur Reducing Damage Award On Antitrust Count, Or, In The Alternative, For New Trial On Antitrust Damages," to which Unitherm responded. (J.A. 34a-49a, 58a-74a). The trial court denied this motion as follows: "Defendant's argument is limited to the alleged inconsistency of the verdict. Defendant does not assert the $6 million award was not supported by the evidence. Indeed, Plaintiffs have offered evidence demonstrating a much larger amount of damages." (J.A. 118a-120a).[7]

ConAgra also filed a "Motion to Amend Judgment Entered on April 9, 2003, Pursuant to Fed. R. Civ. P. 59(e) And To Set Amount of Supersedeas Bond," to which Unitherm responded.

[6] Because the tort damages were subsumed within the antitrust damages, the trial court entered an agreed judgment for treble the amount of the SHERMAN ANTITRUST ACT Section 2 damages pursuant to 15 U.S.C. § 15. In short, the parties agreed that the amount of the tort and punitive damages was not cumulative with the amount of the antitrust damages.

[7] ConAgra did not renew its "inconsistent verdict" argument on appeal.

(J.A. 50a-57a, 105a-113a). The trial court denied the portion of the motion under Rule 59(e), because it was out of time. (J.A. 114a-117a). This motion also contained no sufficiency of the evidence arguments.

2. Proceedings Before The Federal Circuit

ConAgra appealed to the United States Court of Appeals for the Federal Circuit where it challenged the sufficiency of the evidence on nearly every element of every cause of action upon which Unitherm prevailed at trial and challenged the trial court's declaration that the '027 Patent is invalid. Ultimately, the Federal Circuit panel affirmed the trial court's declaration that the '027 Patent is invalid and affirmed the jury's verdict on the tortious interference and punitive damages claims. Although the Federal Circuit affirmed the jury's finding that ConAgra had intentionally defrauded the Patent Office to obtain the '027 Patent, it reversed the antitrust verdict citing insufficient evidence of a relevant market, antitrust injury and dangerous probability of success of monopolization.

Most germane to the issues upon which this Court granted certiorari is the Federal Circuit's view of its role in reviewing the jury's verdict. Indeed, a simple comparison among (1) the issues raised in the appellate briefs; (2) the issues decided by the Federal Circuit; and (3) the grounds upon which those issues were decided reveal the Federal Circuit's extraordinary reach to decide issues of fact and law which were not necessary to its decision and which were never addressed by the trial court or the parties' appellate briefs.

Unitherm argued to the Federal Circuit that ConAgra had waived its sufficiency of the evidence arguments on appeal by failing to raise them in Rule 50(a) motions for JMOL during the trial or renew them in a post-verdict motion for JMOL under Rule 50(b). After it had conducted an analysis of the sufficiency of the evidence of all of the *Walker Process* elements, including

fraud on the Patent Office, the Federal Circuit inserted the following footnote:

> ConAgra failed to renew its motion for judgment as a matter of law ("JMOL") after the verdict pursuant to Federal Rules of Civil Procedure 50(b). Unitherm contends that ConAgra therefore waived its right to dispute the sufficiency of the evidence supporting the jury's antitrust verdict. We have ruled as a matter of law that, for issues unique to our jurisdiction, a 50(b) motion is necessary to preserve a sufficiency of the evidence argument for appeal. *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 859-62 (Fed. Cir. 1991). On most issues related to Rule 50 motions, however, we generally apply regional circuit law unless the precise issue being appealed pertains uniquely to patent law. *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1106 (Fed. Cir. 2003). Because we decide antitrust issues that do not implicate patent law, including market definition, under the law of the regional circuits, *Nobelpharma*, 141 F.3d at 1067 n. 5, we similarly apply Tenth Circuit law to determine whether or not ConAgra has preserved its right to appeal. In the Tenth Circuit, the failure of a party to move for a JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence, provided, as is the case here, that the party made the appropriate motion prior to the submission of the case to the jury. *See Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 950-51 (10th Cir. 2004). . . .

(Pet. App. 50a n.7).

At this point in the opinion, the Federal Circuit had already determined that the fraud on the Patent Office element of Unitherm's *Walker Process* claim was governed by Federal Circuit law. (Pet. App. 28a-32a). There is no dispute in this case that ConAgra failed to file a post-verdict motion raising sufficiency of the evidence as to fraud on the Patent Office. Yet, the Federal Circuit engaged in a detailed analysis of the facts and evidence relating to this element.[8] The Federal Circuit laid out all of the elements for a finding of fraud on the Patent Office and conducted a detailed factual analysis over a number of pages of the opinion for each element, far exceeding the scope of the issues raised by ConAgra. (Pet. App. 34a-42a). Indeed, the Federal Circuit's review was so far-reaching that it had to raise *sua sponte* legal issues never addressed in the briefs or the trial court so it could logically navigate its way through the facts.[9] After this stringent review of an issue which under the Federal Circuit's own footnote 7 was not preserved for appeal, the Federal Circuit affirmed the jury's finding that ConAgra had intentionally defrauded the Patent Office in its application for the '027 Patent. (Pet. App. 42a).

The Federal Circuit then reviewed the sufficiency of the evidence of the definition of the relevant market. (Pet. App. 44a-50a). It found that there was substantial evidence of the technologically

[8] In reviewing the sufficiency of the evidence of fraud on the Patent Office element, the Federal Circuit cited to this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000), addressing the general standard for appellate courts' review of sufficiency of the evidence in the face of a timely filed Rule 50 motion. "And the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" 530 U.S. at 150.

[9] The Federal Circuit addressed issues involving patent enforcement, agency law, and the procedural posture of the presence of a *Walker Process* claim combined with a request for a declaration of invalidity – all interesting issues but issues which were never raised by the parties.

unique nature of the Unitherm Process. Nevertheless, it held that there was insufficient evidence that these facts showing a lack of technological substitutability could raise a reasonable inference regarding economic substitutes.[10] ConAgra's briefs to the Federal Circuit never once argue this technical/economic substitution theory upon which the Federal Circuit based its decision.[11] Finding the evidence insufficient to support a relevant market, the Federal Circuit likewise ruled that there could not be sufficient evidence of antitrust harm or dangerous probability of success of monopolization. (Pet. App. 49a-50a).

Both Unitherm and ConAgra sought rehearing and rehearing *en banc*. ConAgra argued issues of claim construction and fraud on the Patent Office. Unitherm argued that the panel was simply and clearly incorrect in footnote 7 when it found that ConAgra had addressed the SHERMAN ANTITRUST ACT Section 2 issues at any point in the proceedings in a Rule 50 motion, and that the panel had impermissibly drawn every inference on economic substitutability in favor of ConAgra and against Unitherm and the jury's verdict. (J.A. 121a-138a). The Federal Circuit denied both parties' requests for rehearing without comment. (Pet. App. 55a-56a).

[10] Unitherm disagrees with the Federal Circuit's conclusion there was insufficient economic evidence related to a relevant market for the process, and also disagrees with the Federal Circuit's decision to substitute its own view of whether the unique nature of the process could support reasonable economic inferences that would assist the trier of fact in defining a market. Contrary to this Court's ruling in *Reeves*, the Federal Circuit "failed to draw all reasonable inferences in favor of the petitioner." 530 U.S. at 152.

[11] Further, ConAgra never once raised a distinction between "technological" and "economic" substitutability in the trial court. Those phrases were uttered for the first time by Judge Gajarsa at oral argument. Consequently, in Unitherm's Petition for Rehearing numerous trial exhibits and testimony describing the economic advantages of the Unitherm Process were brought to the Federal Circuit's attention — to no avail. (Unitherm Pet. for Reh'g and Reh'g En Banc, J.A. 129a-138a).

3. The Circuits Are Split On Appellate Review Of Sufficiency Of The Evidence When A Party Fails To Present A Post-Verdict Rule 50(b) Motion

The Federal Circuit's application of the law of different circuit courts of appeals to different elements of the same cause of action crystallizes the issues before this Court. The Federal Circuit noted in footnote 7 that if it had applied the rule set forth in its *Biodex* decision, ConAgra would have failed to preserve sufficiency of the evidence review for any issues. (Pet. App. 50a n.7).

The Tenth Circuit case relied upon by the Federal Circuit in its footnote 7 is *Cummings v. General Motors Corp.*, 365 F.3d 944 (10th Cir. 2004), where the Tenth Circuit noted the following:

> We note that the vast majority of other circuits have held that the failure to renew a motion for judgment as a matter of law following a jury verdict precludes an appellate court from reviewing the sufficiency of the evidence. *See Adames v. Perez*, 331 F.3d 508, 511-12 (5th Cir. 2003) (holding failure to file a post-verdict motion waives a sufficiency claim, limiting court to a review for plain error); *Cross v. Cleaver*, 142 F.3d 1059, 1069-70 (8th Cir. 1998) (holding, where a party fails to move for judgment as a matter of law following the verdict, the court cannot test sufficiency of evidence beyond plain error to prevent a manifest miscarriage of justice); *Patel v. Penman*, 103 F.3d 868, 879 (9th Cir. 1996); *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 638 (2d Cir. 1995) (failure to make motion results in a waiver of challenge to sufficiency of evidence); *Velazquez v. Figueroa-Gomez*, 996 F.2d 425, 426-27 (1st Cir. 1993); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 862 (Fed. Cir. 1991) (concluding the "failure to present the district court with a post-verdict motion precludes appellate review of sufficiency of the evidence"); *Dixon v. Montgomery Ward*, 783 F.2d 55, 55 (6th Cir. 1986); *Woods v. Nat'l Life & Accident Ins. Co.*, 347 F.2d 760, 769 (3d Cir. 1965) ("A party's failure to file a motion for judgment n.o.v. in the trial court precludes an examination of the record by that court or this court for the purposes of ascertaining whether that party was entitled to a directed verdict."); *cf. Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996) (failure to move for judgment as a matter of law pursuant to Rule 50(b) limits the court's remedial powers, but not the ability to review for error).

365 F.3d at 950 n.1. The Tenth Circuit panel in *Cummings* suggested that it would consider conforming its law to that of the other circuits, but that was beyond the panel's authority:

> Despite the fact that our approach diverges from that taken by the other circuits, we are constrained to follow our prior precedent, as we are "without power to overrule the unequivocally contrary precedent of this Circuit." *Morrison Knudsen*, 175 F.3d at 1246 n.34.

365 F.3d at 950 n.1.

The Tenth Circuit identified contrary authority in the First, Second, Third, Fifth, Sixth, Eighth, Ninth, and Federal Circuit Courts of Appeals.[12] The law in the Fourth Circuit is the same as the Tenth Circuit. *See Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996). There are no cases squarely on point in the other circuits.

---

[12] A recent First Circuit case discussing the issue is *Zachar v. Lee*, 363 F.3d 70, 73-74 (1st Cir. 2004) ("If the Rule 50(a) motion is denied and the case is submitted to a jury, the movant must renew the motion once again in order to preserve the issue for appeal. *See* FED. R. CIV. P. 50(b); MARTIN H. REDISH, 9 MOORE'S FEDERAL PRACTICE § 50.41 (3d ed. 2003).").

This Court granted Unitherm's Petition for a Writ of Certiorari to resolve this split.

SUMMARY OF THE ARGUMENT

This Court has repeatedly emphasized the importance of having the trial judge, who has the "feel" of the case that no appellate transcript can impart, render judgment in the first instance on the sufficiency of the evidence. This is the philosophy that underlies Rule 50(b). Unlike verbal motions made during the heat of trial, a written motion made post-verdict serves the forces of contemplation and careful review. In the absence of a post-trial motion, the appellate court does not have the benefit of the viewpoint of the single most important, impartial participant in the trial – the judge.

A motion for new trial under Rule 59 is an appropriate vehicle for contesting a wide variety of alleged errors made during the course of a trial, but it is not the proper vehicle for arguments based on sufficiency of the evidence.

The vast majority of federal circuit courts of appeals hold that the absence of a post-trial motion for JMOL constitutes a waiver of arguments based on the sufficiency of the evidence. This jurisprudence is in harmony with the clear directions by this Court in numerous cases.

Some circuits simply hold that failure to move for JMOL post-verdict waives sufficiency of the evidence issues and that ends the matter. Other circuits hold that the only review available is for "plain error" under a "manifest injustice" standard. Here, a cursory review of the record demonstrates that there was no "plain error", and that the jury's verdict for Unitherm on its SHERMAN ANTITRUST ACT Section 2 claim should be reinstated.

Finally, a matter that is corollary to the question on certiorari, is the clear fact that ConAgra did not, *at any time*, make a Rule 50(a) motion directed to the issues it raised for the first time on appeal. Unitherm submits that this Court should reaffirm the requirement for an appropriate *initial* Rule 50(a) motion to preserve sufficiency of the evidence issues for appellate review.

ARGUMENT

I. THERE CAN BE NO APPELLATE REVIEW OF SUFFICIENCY OF THE EVIDENCE IN THE ABSENCE OF A POST-VERDICT MOTION FOR JUDGMENT AS A MATTER OF LAW.

A. Previous Decisions Of This Court Strongly Suggest That A Post-Verdict Motion For JMOL Is Mandatory For Appellate Review Of Sufficiency Of The Evidence.

This Court's jurisprudence on Rule 50(b) is primarily contained in four cases. In *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), respondent moved for new trial post-verdict but *not* for j.n.o.v. The court of appeals determined that petitioner's evidence was insufficient and directed that judgment be entered for respondent. This Court described the question on certiorari as follows:

> The petition for certiorari challenged the power of an appellate court to direct entry of a judgment notwithstanding the verdict where timely motion for such a judgment had not been made in the District Court.

Id. at 214-15. This Court stressed the importance of giving the trial judge the opportunity to address post-verdict motions for sufficiency of the evidence, as follows:

> Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) *calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart*. . . . Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded "a last chance to correct his own errors without delay, expense, or other hardships of an appeal."

Id. at 216 (emphasis supplied; internal citations omitted). This Court unanimously held that the court of appeals could not direct judgment for the respondent in the absence of a Rule 50(b) motion for j.n.o.v.

> In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

Id. at 218.[13]

In *Johnson v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 48 (1952), respondent moved for a directed verdict at the close of evidence. The trial court reserved decision on the motion and submitted the case to the jury, which returned a verdict in petitioner's favor. Within ten days of the verdict, respondent "moved to have the verdict set aside." *Id.* at 49. The trial court denied this motion and also denied the pre-verdict motion for directed verdict.

---

[13] The Sixth Circuit read *Cone* as requiring a post-verdict motion to preserve sufficiency of the evidence for appellate review. *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986).

The court of appeals reversed, holding that the motion for directed verdict should have been granted because petitioner's evidence was insufficient to support the verdict. In reversing the court of appeals, this Court stated:

> On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment.

Id. at 50.

This Court held that respondent's post-verdict motion to "set aside" the verdict was not the equivalent of a motion for judgment notwithstanding the verdict - and therefore the court of appeals did not have the power to direct such relief. This Court also held that the trial court's reservation of decision on the motion for directed verdict did not relieve the respondent of its duty under Rule 50(b) to renew its motion within ten days after verdict.

> The rule carefully sets out the steps and procedures to be followed by the parties as a prerequisite to entry of judgments notwithstanding an adverse jury verdict.

Id. at 51.

> This requirement of a timely application for judgment after verdict is not an idle motion. This verdict solves factual questions against the post verdict movant and thus emphasizes the importance of the legal issues. The movant can also ask for a new trial either for errors of law or on discretionary grounds.

> *The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness.*

Id. at 53 (emphasis supplied).[14] This Court noted that the respondent had moved to set aside the verdict and it could be entitled to no more than that.

In *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), respondent moved for directed verdict at the close of petitioner's evidence and again at the close of all the evidence. The jury returned a verdict in petitioner's favor. Respondent then *moved for j.n.o.v.* or, in the alternative, for a new trial "in accordance with Rule 50(b)," which the trial court denied. The court of appeals held the petitioner's evidence was insufficient and reversed with instructions to dismiss. This Court held that where the respondent *had* filed a post-verdict motion for j.n.o.v. and the record had been fully developed in the trial court, the court of appeals was within its power to direct entry of judgment for respondent. The outcome, therefore, buttresses the position that a post-verdict motion for JMOL is required before an appellate court may review sufficiency of the evidence.

In doing so, however, this Court re-emphasized the importance of the role of the trial judge:

> The opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed *strictly to comply with the procedural requirements of Rule 50(b)*, or where the record reveals a new trial issue which has not been resolved. Part of the Court's concern has

[14] The Third Circuit read *Johnson* as requiring a post-verdict motion to preserve sufficiency of the evidence for appellate review. *Woods v. Nat'l Life & Acc. Ins. Co.*, 347 F.2d 760, 769 (3d Cir. 1965).

> been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's firsthand knowledge of witnesses, testimony, and issues — because of his "feel" for the overall case. These are very valid concerns to which the court of appeals should be constantly alert.

Id. at 325 (emphasis supplied).

In *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), respondent moved for JMOL at the close of petitioner's evidence and at the close of all the evidence, on the ground that Petitioner's expert witness testimony had been improperly admitted into evidence under *Daubert*, and that petitioner's evidence was otherwise insufficient. The jury returned a verdict in petitioner's favor. The respondent then renewed its motion for JMOL post-verdict and additionally requested, in the alternative, a new trial, pursuant to Rules 50(b) and 59. The trial court denied the post-verdict motions.

The court of appeals held the expert witness testimony had been improperly admitted in violation of *Daubert*, and that petitioner's remaining evidence was insufficient. The court of appeals directed entry of judgment for respondent.

The difference between *Neely* and *Weisgram* is that the evidence was insufficient in *Neely* and the evidence *became* insufficient in *Weisgram* when the improperly admitted evidence was excluded. This Court found this distinction did not require a different result and affirmed. *Weisgram* emphasizes the importance of the trial judge's ruling on a post-judgment motion for JMOL, and appears to read *Neely* as requiring a Rule 50(b)

post-verdict motion for appellate review of sufficiency of the evidence, *viz*:

> The remainder of the *Neely* opinion effectively complements Rules 50(c) and 50(d), providing guidance on the appropriate exercise of the appellate court's discretion *when it reverses the trial court's denial of a defendant's Rule 50(b) motion for judgment as a matter of law.*

528 U.S. at 450 (emphasis supplied).

> As *Neely* recognized, appellate rulings *on post-trial pleas for judgment as a matter of law* call for the exercise of "informed discretion," 386 U.S., at 329, and fairness to the parties is surely key to the exercise of that discretion.

Id. at 454 (emphasis supplied).

These cases appear to assume that a post-verdict motion for JMOL is required for appellate review of sufficiency of the evidence. But this issue was not expressly addressed by this Court, because in every instance a post-verdict motion for a new trial or for JMOL *had* been submitted by the verdict loser. In the instant case, the Federal Circuit did not discuss or even cite any of this Court's Rule 50(b) jurisprudence. *Indeed, the Federal Circuit never identified what ruling of the trial court it was reviewing.*[15] It merely embarked upon a wholesale review of the jury's verdict.

---

[15] As a matter of theory, the Federal Circuit must have been reviewing the trial court's denial of ConAgra's pre-verdict motion for directed verdict. However, as pointed out in Part IV, *infra*, the trial court was never asked to rule on the issues upon which the Federal Circuit reversed the jury's verdict.

B. Requiring A Rule 50(b) Motion For Appellate Review Of The Evidence Serves The Purposes Of The Rule.

Rule 50(b) "was adopted for the purpose of speeding litigation and preventing unnecessary re-trials." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250 (1940); *see also* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."); *Otten v. Stonewall Ins. Co.*, 538 F.2d 210, 213 (8th Cir. 1976) ("It is not the purpose of Rule 50, Fed. R. Civ. P., to precipitate unnecessary retrials.").

Review of sufficiency of the evidence under Rule 50(b) must be tempered by the Constitutionally mandated respect for the role of the jury in fact-finding and the trial court's role in overseeing trials in the district court. Indeed, while this case is about the proper circumstances under which a federal appellate court may review a jury verdict for *legal* sufficiency of the evidence, juries remain the exclusive vehicle for deciding contested issues of fact:

> But that rule [Rule 50(b)] has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact — a jury being the constitutional tribunal provided for trying facts in courts of law.

Berry v. United States, 312 U.S. 450, 453 (1941) (footnote omitted). Given the concern of invading the fact-finding duties of the jury, "[s]uch motions 'should be granted cautiously and sparingly.'" *Meloff v. New York Life Ins. Co.*, 240 F.3d 138,

145 (2d Cir. 2001) (quoting 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524, at 252 (1995)); 9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 50.05[6] (3d ed. 2004) ("Because granting a motion for judgment may deprive the nonmoving party of a determination of the facts by the jury, such motions as a matter of law should be cautiously and sparingly granted.") (citing cases in accord from 12 circuits); *see also United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 735 (D.C. Cir. 1998) (because JMOL intrudes on rightful province of jury, it is highly disfavored).

Consistent with the purposes underlying Rule 50 and due deference to the role of the jury and the trial court, another panel of the Federal Circuit discussed in detail the benefits of requiring a post-verdict motion for JMOL as a pre-condition to reviewing the sufficiency of the evidence. In *Biodex v. Loredan Biomedical, Inc.*, 946 F.2d 850, 855 (Fed. Cir. 1991), the Federal Circuit was called upon to determine whether it should require a post-verdict motion for JMOL in order to review sufficiency of the evidence. After noting confusion among the circuits, the *Biodex* court identified a number of factors leading it to require a post-verdict motion for JMOL as a precondition for review of sufficiency of the evidence. *Id.*

The *Biodex* court focused first upon the benefits to appellate review provided by a post-verdict motion under Rule 50(b):

> First, in the preferred and best of circumstances, the district court will produce a thorough written or oral opinion on the motion for JNOV. . . . The trial judge is best positioned to review impartially and in detail the evidence and events at trial, and, "our decisional approach is aided by the trial judge's review . . . setting forth his [or her] reasons for denying the motion for JNOV." . . . The appellate process materially benefits by a comprehensive summary of the course of proceedings below and an impartial review of the

> evidence supporting a verdict. The appellant is directed to the probative evidence contrary to his or her position and the appellate court need not sift through the entire record searching for such contrary evidence.

Id. at 859 (internal citations omitted; court's brackets). Likewise, the trial court's decision on JMOL is aided by renewing the motion post-verdict, consistent with the intent of the Rule. *See also Ortiz v. Greyhound Corp.*, 192 F. Supp. 903, 905 (D. Md. 1959) ("[T]he very object of the new rules of federal procedure in providing for judgments n.o.v. (Rule 50(b)), is founded on the idea that during the trial of the original case the trial judge does not have time before the conclusion of the evidence to thoroughly review some of the questions of law that may arise."). This consideration holds more force in a long trial involving complex legal and factual issues.

The *Biodex* court was equally concerned with having the benefit of the trial court's perspective before attempting to review the sufficiency of the evidence:

> Second, the jury may have been persuaded by many considerations beyond just the credibility of a witness that are not always adequately reproduced in the transcript. The district court "has the same opportunity that jurors have for seeing the witnesses [and] for noting all those matters in a trial not capable of record." *Patton v. Texas & Pac. Ry. Co.*, 179 U.S. 658, 660 (1901). "The trial judge sits as the '13th juror' in evaluating the weight" to be given to all of the evidence, *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989), or in determining that a particular witness's testimony is so inherently incredible that a reasonable mind could not accept it.

946 F.2d at 859-60. The *Biodex* court found that the trial court's ability to judge the weight (not just the credibility) which certain

testimony should be given is also superior. It even noted that the trial court is in a superior position to determine the weight to be given to the testimony of expert witnesses testifying on technical matters. "These concerns are equally applicable to trials of patent issues as to any other." *Id.*

> In short, the printed record on appeal more often than not will not reflect all the persuasive issues that may have determined in the course of events at trial, even when that record is reviewed in its entirety by the appellate court. Thus, denial of a post-verdict motion, even in summary fashion, perforce provides the appellate court with the district court's overall assessment of the events at trial.

Id.

The *Biodex* court further concluded that requiring a post-verdict motion for JMOL "promotes fair and equitable jurisprudence." *Id.* at 860; *see also Johnson*, 344 U.S. at 53 ("The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness."). Rule 50(b) promotes efficiency in the first instance by avoiding unnecessary appeals, because "'[b]y failing to move for JNOV, the trial judge was denied the chance to correct any error by the jury.'" *Biodex*, 946 F.2d at 860 (quoting *Coffman v. Trickey*, 884 F.2d 1057, 1064 (8th Cir. 1989)).

Another consideration directly applicable to the record in this case concerns fairness to the appellee:

> If no post-verdict motion has raised issues of sufficiency of the evidence, an appellant can, by including in the record a transcript of all evidence, as happened in this case, first provide the appellee with notice of the specific factual issues in its appeal in its opening appellate brief. In such circumstances, the appellee's opportunity to respond to these specific factual issues is foreshortened as compared to the opportunity to have joined the issue earlier during the period after the verdict. ***When, as here, the appellant cites only testimony in support of its position, this disparity in opportunities is exacerbated.*** The post-verdict motion thus functions as a timely notice to benefit the appellate process, because briefing and argument are more likely to be informed and informative when the issue has already been joined in post-verdict argument.

Id. at 860 (emphasis supplied).

Here, ConAgra did not mention a challenge to the relevant market or any other SHERMAN ANTITRUST ACT Section 2 element in its pre-verdict motion for JMOL. (J.A. 15a-22a). ConAgra did not file a *Daubert* motion challenging Unitherm's expert economic testimony.[16] (Trial Transcript ("Tr.)" p. 995).[17] ConAgra did not object to that testimony at trial. (Tr. 999-1009; R. A5132-5140). ConAgra did not object to the court's jury instruction describing the relevant market. (R. A5886-89; Tr. 1463-69). ConAgra did not file a post-verdict motion for JMOL or for new trial on these or any issues regarding sufficiency of the evidence. Equally important, ConAgra never once mentioned or argued the technical versus economic substitution theory relied upon by the Federal Circuit. Unitherm was confronted with sufficiency of the evidence arguments for the first time on appeal.

---

[16] *See Macsenti v. Becker*, 237 F.3d 1223, 1231-33 (10th Cir. 2001); *Marbled Murrelet v. Babbit*, 83 F.3d 1060 (9th Cir. 1996). These courts rejected the tactic whereby a party may raise a *Daubert*-like challenge for the first time on appeal in the guise of a sufficiency of the evidence argument.

[17] Citations to portions of the official trial transcript which were not contained in the Federal Circuit Appendix are referenced as "Tr.".

The Federal Circuit should have determined, as Unitherm strongly contended, that these arguments had been waived. Unitherm was seriously prejudiced by the Federal Circuit's foray through the record searching for error when Unitherm's ability to marshall its evidence had been foreshortened.[18]

On appeal, not only was Unitherm required to brief the validity of the patent (which consumed a substantial portion of the brief), it was required to address the sufficiency of the evidence of nearly every element of every claim as well as defend the trial court's jury instructions. In essence, Unitherm was required to re-argue its Motion for Partial Summary Judgment and re-try its entire case on appeal. However, the entire record in the case cannot be submitted to the Federal Circuit on appeal, without violating that court's rules.[19] Even then, the Federal Circuit's opinion addressed issues neither party raised in their briefs. Certainly, a written opinion by the trial judge (Judge Cauthron) on a post-verdict motion challenging the sufficiency of the evidence would have narrowed the issues for appeal and sharpened the parties' focus.

The *Biodex* court further found that a post-verdict motion for JMOL requirement is not burdensome. *Id.* at 861. As this Court stated in *Johnson*, "Rule 50(b) as written and as construed by us is not difficult to understand or to observe." 344 U.S. at

[18] As this Court stated in *Tennant v. Peoria & P.U. R.R. Co.*, 321 U.S. 29 (1944): "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Id.* at 35.

[19] The Federal Circuit has substantially revised Fed. R. App. P. 30, to strictly limit the contents of the appendix. *See* Fed. Cir. R. 30. Parties are prohibited from including anything not identified in the briefs, unless necessary to add context. It is unclear, therefore, how the Federal Circuit can follow this Court's admonition in *Reeves*, that a court reviewing the sufficiency of the evidence is required to review "all of the evidence in the record." *Reeves*, 530 U.S. at 150.

53. Parties will normally have briefed many of the issues prior to trial either in motions for summary judgment, motions in limine, trial briefs, briefs in support of jury instruction or otherwise. "The efficient resolution of controversies at a time of increased filings and overburdened dockets is further served by a standard for reviewability that requires a party to have set forth the specific defects in the evidentiary support for a judgment in the district court in order to obtain appellate review." *Biodex* at 861.

A decision by this Court excusing the need to file a Rule 50(b) motion to preserve sufficiency of the evidence will result in more appeals and/or more factual issues being reviewed by appellate courts. Such an outcome does not further Seventh Amendment values. It is wholly inconsistent with the longstanding and oft-repeated distinctions between the constitutional roles and competencies of juries and judges and the equally common judicial declarations of the different competencies between trial judges and appellate courts in the review of factual findings.

The opinions of this Court, *Biodex* and numerous other courts and commentators have discussed the impediments to informed appellate court review of a jury's fact finding. This concern becomes heightened when appellate courts face an ever-increasing caseload. Between January 1, 1997 and December 31, 2001, filings in the federal appellate courts grew nine percent and have continued to hit new records every year since. OFFICE OF HUM RES. & STATS., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD: RECENT TRENDS (2002); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2004 (2005) (courts of appeals filings increased to an "all-time high").

Since the earliest days following the enactment of Rule 50, the courts of appeals have encouraged district courts not to grant directed verdicts before the jury has had an opportunity to render its own decision about the evidence. *See Fratta v. Grace Line*,

Inc., 139 F.2d 743, 744 (2d Cir. 1943). In addition to allowing the district court the opportunity for additional reflection after the verdict (as opposed to the hectic middle of a trial),[20] the circuit and district courts are in unanimous agreement that the more prudent course is to submit the case to the jury, even if the judge believes the evidence to be insufficient. 9A CHARLES A. WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2533 at pp. 318-19 (2d ed. 1995 & Supp.) (citing numerous cases); *see also Selle v. Gibb*, 567 F. Supp. 1173, 1179-80 (N.D. Ill. 1983) ("In fact, the practice of a trial judge submitting the case to a jury for verdict, even though the evidence appears insufficient, is generally approved.") (citing cases). If a jury agrees with a trial judge who believes the evidence is insufficient, it is preferable that the jury, and not the judge, render verdict against the losing party.[21]

A rule allowing a party to appeal the sufficiency of the evidence without first filing a post-verdict motion for JMOL will reduce the incentive of a party to exercise its rights under Rule 50(b). Consequently, trial courts will be deprived of a last opportunity to order judgment that the law requires and increase the number and scope of factual issues that appellate courts will be forced to address. *See* 9A CHARLES A. WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521 at pp. 242 (2d ed. 1995); *see also Montgomery Ward*, 311 U.S. at 250 (Rule 50(b) adopted to avoid unnecessary retrials). If the verdict loser is convinced of its entitlement to a new trial or judgment after the verdict, it should at least be required to ask for it.

---

[20] *See Ortiz*, 192 F. Supp. 903 at 905.

[21] "[T]rial judges are formally encouraged for cogent reasons of judicial economy ordinarily to submit all but the plainest cases for jury verdict subject to the reserved ruling . . . ." *Colonial Lincoln-Mercury v. Musgrave*, 749 F.2d 1092, 1098 n.3 (4th Cir. 1984); *Flannery v. Pres. & Dirs. of Georgetown Coll.*, 679 F.2d 960 (D.C. Cir. 1982) (unfortunate that district court did not follow practice of awaiting motion for j.n.o.v. before directing verdict, requiring potentially unnecessary new trial).

In sum, the majority view requiring a post-verdict motion for JMOL as a pre-condition to appellate review of the sufficiency of the evidence is most consistent with and best serves the purposes for which Rule 50(b) was enacted.

II. SUFFICIENCY OF THE EVIDENCE ARGUMENTS MAY ONLY BE RAISED BY MOTION FOR JUDGMENT AS A MATTER OF LAW, NOT BY MOTION FOR NEW TRIAL.

Rule 50(b) is concerned exclusively with the issue of sufficiency of the evidence in a jury trial. Failure to make a Rule 50(b) motion precludes appellate review of the sufficiency of the evidence. Rule 59, on the other hand, provides a far broader range for assertion of reversible error. The drafters of the federal rules found it was impracticable to enumerate all the grounds for a new trial.[22] Rule 59 gives the trial judge power to prevent what she considers to be a miscarriage of justice. If the losing party has properly preserved objections to the admission (or rejection) of evidence, to jury instructions, to claims of misconduct by the winning party, to claims of unfair and prejudicial surprise, etc., such party may be entitled, upon proper and timely motion therefor, to a new trial. Since it could never be predicted what the jury might have done if the offending evidence had not been admitted (or if the positive evidence had been admitted), or what the jury's verdict would have been in the face of any of the other claims of error, all the movant can be entitled to is a new trial, not judgment in his favor.

The waiver of the right to request judgment notwithstanding the verdict does not prevent a party from moving for new trial on the ground that the verdict is against the weight of the evidence.

---

[22] Armistead M. Dobie, *Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 299 (1939).

Velazquez v. Figueroa-Gomez, 996 F.2d 425 (1st Cir. 1993).[23] Thus, on a motion for a new trial – unlike a motion for judgment as a matter of law – the judge may set aside the verdict even though there is substantial evidence to support it. *See Lama v. Borras*, 16 F.3d 473, 477 (1st Cir. 1994).[24]

Appellate review of an order denying a motion for new trial is reviewed under a deferential abuse of discretion standard.[25] However, it has been frequently observed that an order denying a new trial on the ground that the verdict was not against the weight of the evidence, "is virtually unassailable." *Douglas County Bank & Trust Co. v. United Fin., Inc.*, 207 F.3d 473, 478 (8th Cir. 2000).

This Court analyzed the distinction between motions for judgment as a matter of law and motions for new trial in *Weisgram*, where this Court observed that a new trial motion may invoke the trial court's discretion in determining that, for example, the verdict is against the weight of the evidence, thus mandating a new trial. However, sufficiency of the evidence arguments are properly raised by a motion for judgment as a matter of law, not by a motion for new trial:

---

[23] Of course, failure to move for a new trial likewise waives the issue of the weight of the evidence on appeal. *Id.* at 427.

[24] In *Poynter by Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989), the court stated,

> Under Rule 59 of the Federal Rules of Civil Procedure, a trial judge may weigh the evidence and consider the credibility of witnesses and, if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial.

[25] An order *granting* a new trial is not appealable. *Allied Chem. Corp. v. Diaflon, Inc.*, 449 U.S. 33 (1980).

> Many rulings on evidence, of course, do not bear dispositively on the adequacy of the proof to support a verdict. For example, the evidence erroneously admitted or excluded may strengthen or weaken one side's case without being conclusive as to the litigation's outcome. Or, the evidence may abundantly support a jury's verdict, but one or another item may have been unduly prejudicial to the verdict loser and excludable on that account.
>
> * * *
>
> Such run-of-the-mine, ordinarily nondispositive, evidentiary rulings, we take it, were the sort contemplated in *Montgomery Ward*. *Cf.* 311 U.S. at 245-246, 61 S. Ct. 189 (indicating that sufficiency-of-the evidence challenges are properly raised by motion for judgment, while other rulings on evidence may be assigned as grounds for a new trial).

528 U.S. at 452 n.9.

III. THE "EXTENT" TO WHICH AN APPELLATE COURT MAY REVIEW SUFFICIENCY OF THE EVIDENCE IN THE ABSENCE OF A POST-VERDICT MOTION FOR JMOL IS EITHER NONE AT ALL, OR FOR "PLAIN ERROR" UNDER A MANIFEST INJUSTICE STANDARD.

A. Standard of Review

When an appellant fails to timely move for JMOL post-verdict, appellate courts often conduct no review of the jury's verdict for sufficiency of the evidence. *Eaddy v. Yancey*, 317 F.3d 914 (8th Cir. 2003); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850 (Fed. Cir. 1997); *Velazquez v. Figueroa-*

Gomez, 996 F.2d 425 (1st Cir. 1993); *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986). In addition to the general doctrine that an appellate court will not address issues first raised on appeal,[26] "the rationale for the rule is that a party's failure to make a motion for JMOL works as a concession that sufficient evidence exists for jury to reach a verdict." 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed. 1994). The appellate courts "do not reward litigants who fail, whether inadvertently or intentionally, to exercise their rights under the Federal Rules of Civil Procedure." *Eaddy*, 317 F.3d at 916.

When a party fails to make a timely Rule 50(b) motion or otherwise preserve an issue for appeal in a civil case, the appellate court may, at most, review only for plain error. However, plain error review is not merely another level of review of the sufficiency of the evidence. Properly construed, a plain error review is not directed to a review of the sufficiency of the evidence at all. Instead, "[t]he 'plain error' exception in civil cases has been limited to errors which seriously affect 'the fairness, integrity or public reputation of judicial proceedings.'" *McEwen*, 926 F.2d at 1545 (quoting *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1460 (10th Cir. 1987)). It is an "'extraordinary, nearly insurmountable burden.'" *Royal Maccabees Life Ins. Co. v. Choren*, 393 F.3d 1175, 1181 (10th Cir. 2005) (quoting *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 802 (10th Cir. 2001)). "The 'miscarriage of justice' must be 'patently plainly erroneous and prejudicial.'" *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1408 (10th Cir. 1991) (quoting *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1516 (10th Cir.), *aff'd*, 472 U.S. 585 (1985). "[T]he plain error doctrine, especially in civil cases, should be applied only where the error is so serious and flagrant that it goes to the very integrity of the

[26] "This court will generally not address issues that were not raised and ruled upon by the district court." *McEwen v. City of Norman*, 926 F.2d 1539, 1545 (10th Cir. 1991).

trial." *Brenner v. World Boxing Council*, 675 F.2d 445, 456 (2d Cir. 1982) (internal quotation marks omitted).

The plain error concept was long confined to criminal cases and codified in Rule 52(b) of the Federal Rules of Criminal Procedure.[27] This Court reviewed for plain error in *United States v. Olano*, 507 U.S. 725 (1993), and made it clear that *if* the appellate court finds plain error, it may *in its discretion* correct it:

> Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."
>
> * * *
>
> Rule 52(b) is permissive, not mandatory. If the forfeited error is "plain" and "affect[s] substantial rights," the court of appeals has authority to order correction, but is not required to do so.

507 U.S. at 732, 735. This Court held that the "plain error" in *Olano* did not "affect substantial rights" and reversed.

[27] In 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 5043, p. 236 (1977), it is stated: "Many of the reasons given for the use of the 'plain error' doctrine are simply not applicable in civil cases. Moreover, few evidentiary errors will have the required impact on the fairness of the trial." 9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 51.42 (3d. ed. 2004) states: "The standard for plain error reversal in civil cases is extremely high, and reversal is appropriate only if an error is so fundamental as to amount to a miscarriage of justice, or if the error affects 'fairness, integrity, or public reputation of judicial proceedings.'"

And in *Johnson v. United States*, 520 U.S. 461 (1997), this Court stated:

> We therefore turn to apply here Rule 52(b) as outlined in *Olano*. Under that test, before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." . . . If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.
>
> * * *
>
> When the first three parts of *Olano* are satisfied, an appellate court must then determine whether the forfeited error "seriously affects the fairness, integrity or public reputation of judicial proceedings" before it may exercise its discretion to correct the error.

Id. at 466-67, 469-70 (internal citations omitted).

This Court found in *Johnson* that, even assuming plain error that affected substantial rights, the final requirement of the plain error test was not met. It would seem illogical to apply a less stringent standard for plain error review in civil cases, where the plain error concept migrated with much less justification for its appropriateness.[28] In summary, an appellate court should not review at all for sufficiency of the evidence in the absence of a Rule 50(b) motion for JMOL. At most, it should be only permissive, not mandatory, for an appellate court to review for

[28] In 2003, Rule 51 of the Federal Rules of Civil Procedure was amended to add a provision allowing review of *jury instructions* for plain error. *See* Fed. R. Civ. P. 51(d)(2). The Federal Circuit did not address any issue regarding jury instructions in its opinion.

plain error, and then to act only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings."[29]

B. The Jury's Verdict In This Case Is Supported By More Than Sufficient Evidence And Is Not Subject To A Finding Of Plain Error.

The extraordinarily rare plain error or "manifest injustice" exception is not applicable to this case. One can hardly find manifest injustice where ConAgra intentionally defrauded a federal agency, the United States Patent Office, to obtain the '027 Patent. Contrary to the express teachings of this Court, the Federal Circuit conducted an independent review of selected evidence of the definition of the relevant market, antitrust injury and dangerous probability of success, drawing the inferences in ConAgra's favor. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000). The Federal Circuit's review of sufficiency of the evidence was not moored to any ruling admitting or excluding evidence or any grant or denial of a jury instruction, or to any ruling whatever made by the trial court.

The Federal Circuit's key finding is an excellent example of it drawing inferences in ConAgra's favor and ignoring the evidence favoring Unitherm. The Federal Circuit's statement that, "ConAgra's inability to attract any licensees is indicative of a lack of pricing power, *the* single most important element in defining a relevant antitrust market", (Pet. App. 48a) (court's emphasis), misses the economic reality of this case — which was not lost on the jury. When ConAgra fraudulently obtained its patent, it sought to impose a royalty of 10¢ a pound, which it knew no one could possibly pay and remain profitable. (R. A3586-87; 3603). ConAgra set the royalty unreasonably high to restrict output, not to obtain royalty income. The absence of license sales is, in fact, evidence of successful monopolization.

[29] It is well settled that even a constitutional right may be forfeited. *Olano*, 507 U.S. at 731.

Indeed, ConAgra purported to offer a license only to non-infringers, but it sent its threatening letters only to those who *had* infringed. (R. A3748-49, 4471, 4473, 4475-76, 4479-80, 4483-84, 4487-91, 4504, 4799-4809). Thus, by definition, a license was not being offered to Jennie-O, the entity ConAgra sued for infringement in its counterclaim. The Federal Circuit's opinion in this case results in a roadmap to a monopolist seeking to foreclose a nascent process market without incurring antitrust consequences — just raise prices so high that there will be no sales, there will be no evidence of "pricing power", and thus no relevant market.

The Federal Circuit panel's statement that there was no evidence from which a reasonable jury could draw economic inferences, reveals that the panel was only interested in inferences with which it agreed. Unitherm introduced into evidence letters it had written to ConAgra and Jennie-O discussing the economic benefit of the Unitherm Process as compared to the conventional batch house process which the industry was primarily using at the time. (R. A0006-08, 3728-29, 4754-55). At an operating rate of 112,000 pounds of product per day (*i.e.*, 7000 pounds per hour at 16 hours per day), the economic benefit of the Unitherm Process is $6000 per day. (*Id.*). This translates into 5.35¢ a pound. The economic significance of this benefit and the impact and importance of the patented process in the industry are thus readily apparent in light of the unrefuted testimony of Jennie-O's president that "the food industry in general . . . is a business of pennies" and that Jennie-O's overall company-wide profit in the year prior to trial was only about 3¢ a pound. (R. A3603).

By the time the industry began converting to the Unitherm Process and ConAgra filed its bogus patent application, there clearly would have been considerable price elasticity of demand had ConAgra offered a reasonable royalty. A royalty of 10% of the gross economic benefit of the process would be about a half-cent per pound and would be equivalent to about 18% of Jennie-O's average overall profit margin of 3¢ a pound. ConAgra demanded a royalty amounting to almost twice the economic

benefit of the process and more than three times Jennie-O's average margin on all products. The jury clearly understood the import of the testimony of Jeffrey Ettinger, the President of Jennie-O, that "to have to pay 10-cent-a-pound royalty on a product line makes you very uncompetitive very quickly." (R. A3603). At Jennie-O's production rate, their royalty payment to ConAgra would have been $1.8 million a year, escalated annually over many years. (R. A3600, 3602).

The record shows that there are no reasonable substitutes and that the Unitherm Process provides very large, real economic benefits. In fact, the record is filled with evidence that the Unitherm Process significantly increases product yield (typically by at least 4%), reduces labor costs, increases production capacity, reduces chilling costs, reduces heat input into the product, reduces injection requirements, improves product safety, and increases product shelf life. (*See, e.g.*, R. A3350-52, 3464-65, 3504-06, 3586-87, 3728-29, 4383-87, 4391-94, 4396-98, 4402-24, 4472, 4709-25, 4754-55, 4772, 5132-34). These benefits are all acknowledged by ConAgra in the patent itself. (*See, e.g.*, R. A0007, Col.2:16-36,47-50 and A0010-11).

A company like Jennie-O could *not go back to using the conventional batch house process if it were required to stop using the Unitherm Process* "because of the added food safety risk. In 1999 the FSIS [USDA, Food Safety Inspection Service] published a guideline for the cooling of products and the control of temperature in the products, and the old process would not meet their guidelines without significantly altering the product." (R. A3505-06). The record also contained significant evidence that other processes such as deep frying, (R. A0007, Col. 1:19-26; Col. 1:44-50, Col. 2:36-44); (*see also* R. A0007, Col.1:19-26, Col.1:27-31, Col.1:44-50, Col.2:36-44; A3280, 3339-44, 3354-55, 3669-70, 4220, 5133-34), and caramelization (R. A3280) (admission by ConAgra that caramelization does not produce a golden-brown product); (R. A3354-55)

(dull muddy color and crispy appearance), are not adequate substitutes because they do not create the same product. ConAgra's own statements and marketing materials support a reasonable inference that no reasonable substitutes exist for the process. (R. A.3670, 4010, 4017, 4021, 4075; *Br. for Pls.-Aplees to Fed. Cir.* pp. 30-31).

The Unitherm Process is a distinct process with distinct benefits and advantages that has significant money-saving consequences. (R. A3354, 3586, 5177). It is undeniable that these facts have economic consequences from which reasonable inferences about the market may be drawn. As the panel noted, "Market definition and antitrust injury . . . are intensely factual determinations." (Pet. App. 13a). The trial court properly left these issues to the jury pursuant to instructions that were not objected to by ConAgra. As previously noted, ConAgra did not file a *Daubert* motion and never objected to Dr. Mangum's (Unitherm's economic expert) methodology or testimony regarding the relevant market. Clearly there was evidence before the jury that supported the verdict and would preclude a plain error finding.

The Federal Circuit discredited Unitherm's evidence of the economic benefits of the process by focusing exclusively on inferences favoring ConAgra's arguments. In short, the Federal Circuit impermissibly substituted its judgment concerning the weight of the evidence for the jury's. This is what *Reeves* expressly held is improper. 530 U.S. at 152-53. The remedy is reinstatement of the trial court's judgment.

> Given the evidence in the record supporting petitioner, we see no reason to subject the parties to an additional round of litigation before the Court of Appeals rather than to resolve the matter here.

Id. at 153.

The Federal Circuit erroneously found that, "Mangum explicitly testified that, to the best of his knowledge, there has never been a transaction in *his* proposed relevant market." (Pet. App. 48a) (emphasis supplied). This is simply incorrect. Dr. Mangum testified that a different, hypothetical market conjured up by ConAgra's counsel did not exist.

> Q. Well, how could there be harm to a market that doesn't exist?
>
> A. I said the market *you described* doesn't exist. I've described a market that very much exists.

(R. A5154) (emphasis supplied); (*see also* R. A5132). In fact, Dr. Mangum testified there were transactions in the relevant market. (R. A5152, 5154-55). Contrary to the statements in its opinion addressing Unitherm's SHERMAN ANTITRUST ACT Section 2 claim, the Federal Circuit, itself, identified numerous transactions in the market when it affirmed the declaration of patent invalidity. (Pet. App. 23a-26a, 37a).

Further, the Federal Circuit misapprehended Dr. Mangum's testimony by confusing the market for processes with a market for food products, a confusion repeatedly advanced by ConAgra at trial, but rejected by the jury. (Pet. App. 47a). Dr. Mangum expressly testified "there are no food products in the relevant market." [30] (R. A5167, 5172; *Br. for Pls.-Aplees. to Fed. Cir. pp. 33-36*). Consumers of food products are not customers or potential customers for the patented process. The food processors who were customers for the Unitherm Process could not compete on equal footing with ConAgra in producing the precooked, whole muscle, golden-brown turkey product to the wholesale trade if they were

[30] Dr. Mangum testified: "I have not identified a relevant market involving food products, the market where people buy and sell food products. I identified a relevant market for people who are buying machinery and processes." (R. A5172).

foreclosed from receiving the cost and yield benefits of the Unitherm Process.[31]

The Federal Circuit's improper invasion of the jury's fact-finding province is clearly displayed in the opinion's discussion of antitrust injury. (Pet. App. 49a). The Federal Circuit stated that all Unitherm's economic expert did in this regard was to point to the damages expert. In fact, Unitherm's economic expert stated that the damages expert (Jeff Kinrich) would identify the "measure" of damages. (R. A5139-5140). This, after Dr. Mangum had clearly testified that the harm from ConAgra's actions was not merely harm to Unitherm as a single competitor, but harm to competition as a whole. (*Id.*). Mr. Kinrich, likewise, testified in detail about the specific harm and measure of damages incurred by Unitherm as a result of ConAgra's anti-competitive activity. (R. A5188-5205). ConAgra's actions affected a market in an anti-competitive way. *That* is antitrust injury.

The record before the Federal Circuit contained more than enough evidence to affirm the jury's antitrust verdict. There certainly was no "manifest injustice" constituting plain error in the trial court. The jury's verdict should be reinstated.

IV. THIS COURT SHOULD CORRECT THE FEDERAL CIRCUIT'S PATENTLY ERRONEOUS IDENTIFICATION OF A PRE-VERDICT MOTION FOR JMOL THAT CONAGRA NEVER MADE.

The opinion of the Federal Circuit reviewed the sufficiency of Unitherm's antitrust proof based upon an erroneous finding that ConAgra had made a pre-verdict motion for JMOL under Rule 50(a). (Pet. App. 51a n.7). Indeed, the Federal Circuit found that if the evidence were reviewed under Federal Circuit law, it could not reach the antitrust issues at all. (*Id.*). Although it acknowledged that

[31] Robert Wood, Jennie-O's Senior Vice President of Operations, testified: "If I had to compete head to head with everything using the Unitherm process and I could not use it, I would be uncompetitive in the marketplace." (R. A3586-87).

without a pre-verdict motion for JMOL even the Tenth Circuit would not address sufficiency of the evidence, it stated that ConAgra had preserved the issues with a pre-verdict Motion for JMOL.[32]

The Federal Circuit was flatly incorrect. ConAgra simply did not argue any such motion relating to the elements of Unitherm's SHERMAN ANTITRUST ACT Section 2 claim. (R. A5232-5239, 5884). The trial judge was reversed for rulings she did not make and was never asked to make. No circuit split or confusion exists under these circumstances. ConAgra waived its right to appellate review of the evidence as to the SHERMAN ANTITRUST ACT Section 2 elements. *Davoll v. Webb*, 194 F.3d 1116, 1136 (10th Cir. 1999).

A Rule 50(a) motion, by the very terms of the Rule, must "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." *See Davoll*, 194 F.3d at 1136 ("failure to move for a directed verdict on a particular issue will bar appellate review of that issue"). "The touchstone on this issue is that vague arguable references to a point in the district court proceedings do not . . . preserve the issue on appeal." *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 720 (10th Cir. 1993) (internal quotations marks omitted); *see also Cummings v. General Motors Corp.*, 365 F.3d 944, 950-51) (10th Cir. 2004) ("The motion must include all issues challenged, as the 'failure to move for a directed verdict [now motion for judgment as a matter of law] on a particular issue will bar appellate review . . .'") (quoting *Davoll*, 194 F.3d at 1136).

Unitherm submits that this Court may take notice of and address this obvious error by the Federal Circuit. As in *Reeves*, this Court should reverse the Federal Circuit and reinstate the trial court's judgment. 530 U.S. at 153.

[32] "In the Tenth Circuit, the failure of a party to move for JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence, provided, *as is the case here*, that the party made the appropriate motion prior to the submission of the case to the jury." (*Id.*) (emphasis supplied).

CONCLUSION

Rule 50(b) serves a highly important function in the federal judicial system. It assigns to the trial judge, who has the same opportunity as the jurors to see the witnesses and has the "feel" of the case, the task of reviewing sufficiency of the evidence "after all his rulings have been made and all of the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone." *Cone*, 330 U.S. at 216. It is a task for which appellate courts are not well suited. If the loser of a jury trial fails to file a Rule 50(b) motion, the appellate court should not attempt to review for sufficiency of the evidence. Such review has been waived. The factual mistakes made by the Federal Circuit panel here would have been avoided if it had the informed views of the trial judge in post-verdict review. At most, a review for plain error should be only permissive, not mandatory, and should be confined to error that is so flagrant as to seriously affect the fairness, integrity, or public reputation of judicial proceedings. Such error did not occur here.

Unitherm respectfully submits this Court should reverse the Federal Circuit and affirm the trial court's judgment.

Respectfully submitted,

DENNIS D. BROWN
FELLERS, SNIDER,
BLANKENSHIP, BAILEY
& TIPPENS
321 S. Boston, Suite 800
Tulsa, OK 74103-3318
(918) 599-0621

BURCK BAILEY
Counsel of Record
GREG A. CASTRO
JAY P. WALTERS
FELLERS, SNIDER,
BLANKENSHIP, BAILEY
& TIPPENS
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102-8820
(405) 232-0621

Attorneys for Petitioner

(4)

No. 04-597

Supreme Court, U.S.
FILED
JUL 15 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT-ECKRICH, INC., DOING BUSINESS AS CONAGRA REFRIGERATED FOODS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENT

ROBERT A. SCHROEDER
Counsel of Record
JOHN R. REESE
LEIGH OTSUKA CURRAN
ROBERT C. HORTON
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue,
Suite 4400
Los Angeles, California 90071
(213) 680-6400

JOHN P. PASSARELLI
DAVID H. ROE
MCGRATH NORTH
MULLIN & KRATZ
PC LLO
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Court's order of February 28, 2005 granted certiorari limited to the following question:

> Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59.[1]

If this Court holds that a court of appeals may not review the sufficiency of the evidence under the circumstances described in the above question, then two additional questions would be presented:

1. Should that holding be applied retroactively in this case and in other open cases already tried in circuits where the established law was to the contrary?

2. Should ConAgra still prevail in this case under the plain error rule?

---

[1] The Court's formulation of the question presented contains a premise that is incorrect in this case, because ConAgra did move for a new trial. Although the motion was directed at the amount of damages, not the sufficiency of the evidence, the trial court could have granted a new trial on any meritorious ground, whether or not it was advanced in the motion. *See* Fed. R. Civ. P. 59(d).

RULE 29.6 STATEMENT

The parent company of Respondent Swift-Eckrich, Inc., now doing business as ConAgra Refrigerated Foods Food Company ("ConAgra") is ConAgra Foods, Inc., which is a publicly traded company that owns more than 10% of ConAgra's stock.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
RULE 29.6 STATEMENT		ii
RULES AND STATUTES INVOLVED		1
STATEMENT OF THE CASE		1
I.	The ConAgra Patent	1
II.	The Suit By Unitherm And Jennie-O	2
III.	ConAgra's Motion For Summary Judgment	3
IV.	Unitherm And Jennie-O's Motion For Summary Judgment	4
V.	The Trial	5
	A. The Claims Tried	5
	B. Unitherm's Antitrust Evidence At Trial Was Deficient For The Reasons Explained In ConAgra's Pre-Trial Brief And Summary Judgment Motion	5
	C. ConAgra's Motions For Judgment As A Matter Of Law	8
	D. The Verdict And Judgment	10
	E. ConAgra's Post-Trial Motion For A New Trial	11
VI.	The Appeal	12
SUMMARY OF ARGUMENT		14
ARGUMENT		18
I.	ConAgra Preserved Sufficiency Of The Evidence As An Issue For Appeal	18

TABLE OF CONTENTS – Continued

		Page
	A. ConAgra Complied With The General Rule That Permits Only Issues Raised Below To Be Appealed	18
	B. ConAgra Complied With Rule 50	20
	C. Distorting Rule 50(b) To Require Post-Verdict Renewal Of The Motion For JMOL Serves No Useful Purpose	24
	D. This Court's Rule 50(b) Cases Support The Federal Circuit's Remand For A New Trial	28
	E. Rule 50(b) Should Be Interpreted As Written	34
II.	If A Rule More Stringent Than That Of The Tenth Circuit Is Adopted, It Should Not Be Applied Retroactively In This Case	35
III.	ConAgra's Rule 50(a) Motion Was Sufficient	39
IV.	Since Unitherm Presented No Evidence Of Antitrust Liability, It Was Plain Error To Allow The Jury To Decide That Issue	42
CONCLUSION		49

TABLE OF AUTHORITIES

	Page
CASES	
A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992)	27
Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983)	40
Adames v. Perez, 331 F.3d 508 (5th Cir. 2003)	26
Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 722 (5th Cir. 1999)	7
American Paint Svc. v. Home Ins. Co. of N.Y., 246 F.2d 91 (3d Cir. 1957)	33
American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990)	36, 37
Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988)	44
Anderson v. United Tel. Co. of Kansas, 933 F.2d 1500 (10th Cir. 1991)	41
Aquionics Acceptance Corp. v. Kollar, 536 F.2d 712 (6th Cir. 1976)	27
Battle v. Mem. Hosp. at Gulfport, 228 F.3d 544 (5th Cir. 2000)	40
Benner v. Nationwide Mut. Ins. Co., 93 F.3d 1228 (4th Cir. 1996)	26
Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986)	46
Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850 (Fed. Cir. 1991)	22, 25, 27, 42, 46
Bradford v. United States, 651 F.2d 700 (10th Cir. 1981)	19

TABLE OF AUTHORITIES – Continued

Page

Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp., 41 F.3d 182 (4th Cir. 1994) 43

Brown v. Alkire, 295 F.2d 411 (10th Cir. 1961) 33

Burge v. Parish of St. Tammany, 187 F.3d 452 (5th Cir. 1999) 26

Bus. Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533 (1991) 20

C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340 (Fed. Cir. 1998) 4

Castellano v. Fragozo, 311 F.3d 689 (5th Cir. 2002) 26

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 36, 37

Clark v. Flow Measurement, 948 F. Supp. 519 (D.S.C. 1996) 7

Coffman v. Trickey, 884 F.2d 1057 (8th Cir. 1989) 27

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 15, 28, 29, 30

Cone v. West Virginia Pulp & Paper Co., 170 F.2d 770 (4th Cir. 1948) 29, 30

Cross v. Cleaver, 142 F.3d 1059 (8th Cir. 1998) 27

Cummings v. General Motors Corp., 365 F.3d 944 (10th Cir. 2004) 26, 27

Davignon v. Clemmy, 322 F.3d 1 (1st Cir. 2003) 43

Dichmann, Wright & Pugh, Inc. v. Weade, 168 F.2d 914 (4th Cir. 1948) 26

Dunlop Tire and Rubber Corp. v. Thompson, 273 F.2d 396 (8th Cir. 1959) 33

TABLE OF AUTHORITIES – Continued

Page

First Safe Deposit Nat'l Bank v. Western Union Tel. Co., 337 F.2d 743 (1st Cir. 1964) 22

Fiskars, Inc. v. Hunt Mfg. Co., 221 F.3d 1318 (Fed. Cir. 2000) 10

Garman v. Metro. Life Ins. Co., 175 F.2d 24 (3d Cir. 1949) 33

Gaus v. Conair Corp., 363 F.3d 1284 (Fed. Cir. 2004) 39

Glenn v. Cessna Aircraft Co., 32 F.3d 1462 (10th Cir. 1994) 43

Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948) 15, 28, 29, 30

Guarnieri v. Kewanee-Ross Corp., 270 F.2d 575 (2d Cir. 1959) 27, 33

HBE Leasing Corp. v. Frank, 22 F.3d 41 (2d Cir. 1994) 12

Hansen v. Vidal, 237 F.2d 453 (10th Cir. 1956) 26, 33

Harbor Ins. Co. v. Schnabel Foundation Co., 946 F.2d 930 (D.C. Cir. 1991) 26

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993) 35, 36, 38

Hartford Courant Co. v. Pellegrino, 371 F.3d 49 (2d Cir. 2004) 18

Hicks v. Gates Rubber Co., 928 F.2d 966 (10th Cir. 1991) 19

Johnson v. New York, New Haven & Hartford R.R., 220 F.2d 279 (2d Cir. 1955) 30

TABLE OF AUTHORITIES – Continued

Page

Johnson v. New York, New Haven & Hartford R.R., 344 U.S. 48 (1952) ..... *passim*

Johnson v. Palmer, 129 F. Supp. 202 (E.D.N.Y 1953) 30

Johnson v. United States, 520 U.S. 461 (1997) 44, 49

Kingsdown Med. Consultants, Ltd. v. Hollister, Inc., 863 F.2d 867 (Fed. Cir. 1988) 4

Lantec Inc. v. Novell, Inc., 306 F.3d 1003 (10th Cir. 2002) 7

Lewis v. Nelson, 277 F.2d 207 (8th Cir. 1960) 40

Local 978 United Bhd. of Carpenters & Joiners v. Markwell, 305 F.2d 38 (8th Cir. 1962) 33

Lynch v. City of Boston, 180 F.3d 1 (1st Cir. 1999) 39

Lyons v. Jefferson Bank & Trust, 994 F.2d 716 (10th Cir. 1993) 19

McEwen v. City of Norman, 926 F.2d 1539 (10th Cir. 1991) 44, 45

Mickey v. Tremco Mfg. Co., 226 F.2d 956 (7th Cir. 1955) 33

Miss. Pub. Corp. v. Murphree, 326 U.S. 438 (1946) 38

Mosser v. Fruehauf Corp., 940 F.2d 77 (4th Cir. 1991) 22

Motorola, Inc. v. Interdigital Tech. Corp., 930 F. Supp. 952 (D. Del. 1996) 40

Nat'l Indus., Inc. v. Sharon Steel Corp., 781 F.2d 1545 (11th Cir. 1986) 40

Neely v. Eby Constr. Co., 386 U.S. 317 (1967) .. 28, 31, 32, 34

TABLE OF AUTHORITIES – Continued

Page

Nichols Constr. Corp. v. Cessna Aircraft Co., 808 F.2d 340 (5th Cir. 1985) 22

Norton v. Snapper Power Equip., 806 F.2d 1545 (11th Cir. 1987) 22

Oliveras v. Am. Exp. Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970) 43, 47

Patel v. Penman, 103 F.3d 868 (9th Cir. 1996) 43

Phillips v. AWH Corp., 2005 WL 1620331 (Fed.Cir., July 12, 2005) 6

Railway Express Agency v. Epperson, 240 F.2d 189 (8th Cir. 1957) 40

Royal Maccabees Life Ins. Co. v. Choren, 393 F.3d 1175 (10th Cir. 2005) 44

Russo v. New York, 672 F.2d 1014 (2d Cir. 1982) 43, 47

Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972) 12

Sharp v. United Airlines, Inc., 967 F.2d 404 (10th Cir. 1992) 13

Shaw v. Edward Hines Lumber Co., 249 F.2d 434 (7th Cir. 1957) 22

Sherbahn v. Kerkove, 987 P.2d 195 (Alaska 1999) 27

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 38

Singleton v. Wulff, 428 U.S. 106 (1976) 18

Sojak v. Hudson Waterways Corp., 590 F.2d 53 (2d Cir. 1978) 43

Steuer and Latham, P.A. v. Nat'l Med. Enters., Inc., 672 F. Supp. 1489 (D.S.C. 1987) 8

TABLE OF AUTHORITIES – Continued

Page

Sun Studs, Inc. v. ATA Equip. Leasing, Inc., 872 F.2d 978 (1989) 27

Toscano v. Chandris, S.A., 934 F.2d 383 (1st Cir. 1991) 44

Udemba v. Nicoli, 237 F.3d 8 (1st Cir. 2001) 43

Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961) 27, 33

United States ex rel. Wallace v. Flintco Inc., 143 F.3d 955 (5th Cir. 1998) 26, 43

United States v. Lipscomb, 299 F.3d 303 (5th Cir. 2002) 26

United States v. Olano, 507 U.S. 725 (1993) 44, 45, 49

United States v. Valdosta-Lowndes County Hosp. Auth., 696 F.2d 911 (11th Cir. 1983) 26

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) 4, 47

Weisgram v. Marley Co., 528 U.S. 440 (2000) .. 28, 32, 33, 34

West Virginia Pulp & Paper Co. v. Cone, 153 F.2d 576 (4th Cir. 1946) 28

Wimmer v. Suffolk County Police Dept., 176 F.3d 125 (2d Cir. 1999) 40

Woods v. Nat'l Life & Accident Ins. Co., 347 F.2d 760 (3d Cir. 1965) 27

Yorkshire Indem. Co. v. Roosth & Genecov Prod. Co., 252 F.2d 650 (5th Cir. 1958) 26, 33

Zachar v. Lee, 363 F.3d 70 (1st Cir. 2004) 43

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 2072 38

28 U.S.C. § 2106 ..... 1, 16, 28, 35

FEDERAL RULES

S. Ct. R. 24.1(a) 42, 46

Fed. R. Civ. P. 26 19

Fed. R. Civ. P. 50 ..... *passim*

Fed. R. Civ. P. 51 44

Fed. R. Civ. P. 59 ..... 1, 11

Fed. R. Crim. P. 52 44

Fed. R. Evid. 103 44

STATE RULES

Alaska R. Civ. P. 50(b) 27

New Jersey Ct. R. 4:40-2 27

Idaho R. Civ. P. 50(b) 27, 28

SECONDARY AUTHORITY

3 James Wm. Moore et al., *Moore's Federal Practice* § 115 (Supp. 1947) 20

9 James Wm. Moore et al., *Moore's Federal Practice* § 50.91[3] (3d ed. 2005) 42

9 James Wm. Moore et al., *Moore's Federal Practice* § 50.92[3] (3d ed. 2005) 42

TABLE OF AUTHORITIES – Continued

Page

19 James Wm. Moore et al., *Moore's Federal Practice* § 205.05[1] (3d ed. 2005) 18

Theodore Garver, Note, Johnson v. N.Y., N.H. & H.R.R., *344 U.S. 48 (1952)*, 38 Cornell L.Q. 449, 450 n.9 (1952-1953) 20

21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5043 (1977) 44

Memorandum from Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 109 (May 17, 2004, revised August 3, 2004) 45

RULES AND STATUTES INVOLVED

Title 28 of the United States Code, section 2106 states:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Fed. R. Civ. P. 50 is reproduced at Pet'r App. 57a-60a. Fed. R. Civ. P. 59 is reproduced in the Joint Appendix at 155a-156a.

STATEMENT OF THE CASE

I. The ConAgra Patent.

ConAgra, a food processing company, filed a United States patent application in the name of its employee, Prem Singh ("Singh"). (R. A0006-A0011.) The invention claimed was a process for browning precooked turkey to achieve a "golden brown" color thought to be evocative of a traditional, home-cooked Thanksgiving turkey. (Tr. 1124, 1127.) ConAgra's patent application acknowledged that a very similar process had been used in the past to achieve a "brown" color, but the claims called for "golden brown," not "brown." (Col. 1, l. 50; Col. 2, l. 66.) The U.S. Patent Office issued ConAgra's patent No. 5,952,027 (the "'027 Patent") on September 14, 1999, although the district court and the Court of Appeals for the Federal Circuit were later to find that the distinction between "brown" and "golden brown" did not differentiate a patentable invention from the prior art.

In Spring 2000, ConAgra wrote letters offering licenses under the '027 Patent to five food processors that are its competitors, and to three oven manufacturers. (Tr. 1382.) ConAgra took no steps to compel the taking of licenses or to enforce the patent judicially.[2] (Tr. 1160.) No letter was sent to Petitioner Unitherm Food Systems, Inc. ("Unitherm"). No one accepted a license or even entered into negotiations for a license. (R. A5290.)

II. The Suit By Unitherm And Jennie-O.

This case was brought by Unitherm and Jennie-O Foods, Inc. ("Jennie-O"), a division of Hormel, Inc. Unitherm manufactures ovens and related equipment. It does not process or sell food or compete with ConAgra. Jennie-O makes and sells food products, including precooked browned turkey, in direct competition with ConAgra. (Tr. 333-334.) Jennie-O agreed to participate in this case only after Unitherm accused it of misappropriating from Unitherm the same process that was the subject of the '027 Patent. (R. A0422-A0423, A0440; Pl. Exh. 298.) To settle that dispute, Jennie-O promised to fund this case against ConAgra in exchange for one-half of the net proceeds. (Tr. 965.)

Plaintiffs' main allegations were that Unitherm's principal, David Howard, was the true inventor of the patented golden brown process; that Singh had derived the process from Unitherm; and that Singh, acting as a

[2] ConAgra ultimately filed a compulsory counterclaim charging the plaintiffs with patent infringement, but only after the plaintiffs sought a declaratory judgment of non-infringement and the district court denied ConAgra's motion to dismiss that claim. (Mot. Dismiss Pls.' 2nd Cause of Action, 10/31/01; Order, 1/10/02; R. A0283-A0284.)

ConAgra employee, had falsely purported to be the inventor of the process, thus defrauding the Patent Office. They alleged that ConAgra was using the patent so obtained to interfere with Unitherm's prospective economic advantage and to monopolize the market for "sliceable, pre-cooked turkey" in violation of Section 2 of the Sherman Act and a similar Oklahoma antitrust statute. (R. A0197-A0200.) They further alleged that ConAgra had learned of the process from Unitherm by fraudulently pretending to be interested in purchasing a Unitherm oven (fraud under Oklahoma law). (R. A0195.)

III. ConAgra's Motion For Summary Judgment.

ConAgra moved for summary judgment on the antitrust claims. (J.A. 139a-143a.) ConAgra argued that Jennie-O had admitted it was not damaged by the conduct complained of and that Unitherm did not participate in the alleged relevant market. (J.A. 139a.) The district court granted ConAgra's motion as to Jennie-O, a ruling that was not appealed. Instead of granting the motion as to Unitherm, however, the district court deemed Unitherm's pleadings to be amended to allege monopolization of a supposed market for a "browning smoking process." (J.A. 145a-146a; *compare* R. A0199, ¶ 149 [relevant market for "sliceable cooked turkey products"] *and* 3/27/02, Pl.'s Opp'n to Mot. Summ. J. at 12 [relevant market for browning process]; R. A0402-A0403.) ConAgra argued unavailingly that there is no such market. (5/10/02, Def's. Reply Mot. Summ. J. at 1-3.)

IV. Unitherm And Jennie-O's Motion For Summary Judgment.

Meanwhile, Plaintiffs moved for summary judgment that the '027 Patent is invalid because the patent claims – including the words "golden brown" – did not distinguish an earlier process referred to by Unitherm as "the Unitherm process." This much of Plaintiffs' motion was granted. (R. A0923-A0971.) However, Plaintiffs' motion also asked the district court to rule that the '027 Patent had been obtained by "inequitable conduct" and was, therefore, "unenforceable." (R. A0967-A0970.) Plaintiffs did not ask for a ruling on summary judgment that the '027 Patent had been obtained by fraud on the Patent Office, which is a concept significantly different from unenforceability.[3] The district court's opinion stated: "Because the Court finds the '027 Patent to be invalid and unenforceable, it is not necessary to discuss Plaintiffs' allegations of Defendant's fraud on the Patent Office."[4] (R. A2692-A2693.)

[3] Inequitable conduct is an equitable defense to a charge of patent infringement. Fraud on the Patent Office is part of an affirmative cause of action and requires that the plaintiff prove more. *Kingsdown Med. Consultants, Ltd. v. Hollister, Inc.*, 863 F.2d 867, 873-74 (Fed. Cir. 1988); *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1364 (Fed. Cir. 1998) (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)). Neither "gross negligence" nor the act of submitting claims can support a finding of fraud. *Kingsdown*, 863 F.2d at 873-74. To prove fraud, Plaintiffs were required to prove as facts not only that material information had been intentionally withheld from the Patent Office, but also that the Patent Office would not have issued the '027 Patent if this information had been disclosed.

[4] This statement reflects considerable confusion. The motion did not even raise the question of fraud on the Patent Office. Although unenforceability was raised, it was not discussed in the opinion apart from the quoted statement. What the court apparently meant was that

(Continued on following page)

V. The Trial.

A. The Claims Tried.

A jury trial was had on Unitherm's three remaining claims: (1) the antitrust claims; (2) interference with prospective economic advantage; and (3) fraudulent inducement of Unitherm to reveal the process that is the subject of the '027 Patent by pretending to be interested in buying Unitherm ovens. (R. A2889-A2891.) The parties knew beforehand, in detail, what evidence would be offered and what legal theories would be advanced, particularly with respect to the antitrust claims. This information had been revealed by various motions, expert reports, a joint pre-trial report and pre-trial briefs. (J.A. 145a-146a; R. A2893; J.A. 147a-152a.)

B. Unitherm's Antitrust Evidence At Trial Was Deficient For The Reasons Explained In ConAgra's Pre-Trial Brief And Summary Judgment Motion.

To prevail on its antitrust claim, Unitherm had to prove that ConAgra obtained the '027 Patent by fraud, and then used that patent to monopolize a properly defined relevant market. The pre-trial order and a jury instruction, to which Unitherm did not object, stated that the alleged relevant market was of the same scope as the claims of the '027 Patent. (R. A0062; A2891.) The alleged relevant market was thus limited not only to a process that included a specified succession of steps, but to such a process that yielded products of a precise color: "golden

because the patent was invalid, the question of unenforceability (but not fraud) was moot.

brown," not just "brown," and not even "gold brown."[6] (R. A2891, A5132-A5133.) Unitherm's economic expert based his opinion on this very narrow market definition (R. A5132, A5147, A5156.) He admitted, however, that there was no market for *any* browning process:

> Q. Are you aware of anyone on the face of the earth who has ever succeeded in selling rights to a process for browning turkeys apart from selling ovens?
>
> A. No, I don't.
>
> Q. But that's the market we're talking about, isn't it, sir?
>
> A. That's right.
>
> **Q. So there's never been a transaction in this market?**
>
> **A. That's correct. . . .**
>
> Q. Now, I'd like you to assume, sir, that the market is a market for the sale of processes as distinguished from the sale of hardware that can carry out that process. The market for processes, all right? You understand that?
>
> A. I understand what you're describing.
>
> **Q. In reality, sir, there is no such market, is there?**
>
> **A. I would agree.**

[6] The construction of the patent claims, affirmed by the Federal Circuit, defined the claimed color, "golden brown," to which the scope of the patent was limited, as "a variable color averaging a strong brown that is yellower and slightly darker than gold brown, yellower and paler than average russet, and yellower and less strong than rust." (R. A2687; Pet'r App. 20a.) This construction, however, was based on a claim construction methodology that relied primarily on a dictionary definition of "golden brown" but disregarded the patent specification. This approach has been called into doubt by the Federal Circuit's recent en banc decision in *Phillips v. AWH Corp.*, 2005 WL 1620331 (Fed.Cir., July 12, 2005).

> Q. And so no one could harm that market?
>
> A. Not the market you've described.

(R. A5152-A5154) (emphasis added).

ConAgra's pre-trial brief explained that this antitrust proof would inevitably fail because the claimed relevant market did not actually exist:

> According to Unitherm, the relevant antitrust market in this case is "the process for browning precooked, whole muscle meat products by coating with a browning agent and apply sufficient heat to brown the product without substantial meat shrinkage." (Mangum Report, p. 6.) Unitherm cannot prevail on antitrust claims premised upon this market definition. (J.A. 148a.)
>
> * * *
>
> A market definition must reflect the reality of the market. *See Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 722 (5th Cir. 1999). In order to establish the existence of a relevant product market, "evidence must be offered demonstrating . . . where consumers currently purchase the product [and] where consumers could turn for alternative products or sources of the product if a competitor raises prices." *Lantec [Inc. v. Novell, Inc.]*, 306 F.3d [1003,] 1026 [(10th Cir. 2002)]. When the defendant has no sales in the market as defined by plaintiff, such a market is defined too narrowly. *See Clark v. Flow Measurement*, 948 F. Supp. 519 (D.S. Carolina 1996). (J.A. 150a.)
>
> * * *
>
> Here, Unitherm cannot prove the existence of a market for the '027 golden brown process because it has no evidence of any consumer ***demand*** for the process. No one ever agreed to take

a license from [ConAgra] for the process – in other words, [ConAgra] has no sales in the purported product market, thereby indicating that the plaintiff has defined the market too narrowly. (J.A. 150a) (emphasis in original).

* * *

Here, Unitherm cannot prove the existence of a product market that consists of one player ([ConAgra]) with one product (the '027 golden brown process) and zero sales. (J.A. 151a.)

* * *

If all of these alternatives are considered and the product market given an appropriately broad definition, Unitherm cannot possibly show that [ConAgra's] obtaining the '027 patent (which has now been invalidated) has given it market power, much less a dangerous probability of success of monopolization. *Steuer and Latham, P.A. v. Nat'l Med. Enters., Inc.*, 672 F. Supp. 1489, 1504 (D.S.C. 1987). (J.A. 152a.)

C. ConAgra's Motions For Judgment As A Matter Of Law.

During the trial, ConAgra asked the court about the opportunities counsel would have to make and argue dispositive motions. The district court responded that there would be little or no opportunity to argue such motions unless the court was predisposed to grant those motions:

> [COURT:] Well, of course I have to give you your opportunity to make those motions. What argument I give you will probably depend on whether I think I need argument. . . . Or whether you're likely to win. I'll certainly allow everybody to argue if I think you're going to prevail, and I can almost anticipate what your arguments are going to be at this point. I don't normally need argument, is the short answer, but I never know from time to time. (J.A. 153a.)

At the end of Unitherm's case-in-chief, ConAgra moved for judgment in its favor on all counts. This motion and the judge's response were as follows:

> [CONAGRA:] Your Honor, I would like to make a motion for directed verdict at this point with respect to each of the plaintiffs' claims. Would the Court like to hear anything further about that at this time?
>
> [COURT:] No, not unless you think you've got something that you think will persuade me. (J.A. 15a.)

The court then allowed "five minutes or less" for argument (J.A. 16a), which was clearly not enough to argue all the issues. ConAgra chose for this brief argument the claim of fraud on Unitherm (not fraud on the Patent Office), because this claim presented evidentiary issues that had not been previously briefed. (J.A. 17a-22a.)

At the conclusion of all the evidence, ConAgra again moved for judgment on each claim. The court summarily denied the motion:

> [CONAGRA:] . . . For the record, Your Honor, I would like to make a motion on behalf of the defendant for directed verdict for each of the three causes of action that the plaintiffs have brought. Would the Court like to hear further on that point now?

[COURT:] Is it on the same basis you argued earlier?[6]

[CONAGRA:] Essentially, Yes, Your Honor.

[COURT:] I will overrule those motions for the same reasons I gave earlier. (J.A. 22a.)

D. The Verdict And Judgment.

The jury found that ConAgra had not defrauded Unitherm to obtain disclosure of the process in issue. (R. A0097.) The other two claims were both predicated on an alleged fraud on the Patent Office. (J.A. 24a.) The jury had little choice on this issue since the trial court had, over ConAgra's objections, essentially instructed the jury that ConAgra had defrauded the Patent Office. (R. A0054-A0055.) This instruction was apparently based on the mistaken belief that the court had "previously determined" that issue. (R. A0054-A0055.) This was simply wrong. No such determination had been made, or even sought. Thus, ConAgra was denied its right to have the jury decide this issue based on the evidence, including virtually conclusive evidence that ConAgra made a full and proper disclosure to the Patent Office.[7] (Tr. 1133-1135.) Damages for intentional interference with prospective economic advantage

[6] Since the court had not allowed enough time for any argument on the antitrust and intentional interference claims during the trial, this had to be a reference to the pre-trial brief and other pre-trial papers, not the argument of ConAgra's motions at the close of Unitherm's case-in-chief.

[7] A party that has fully and truthfully disclosed the relevant facts to the Patent Office cannot have defrauded the Patent Office and is not responsible for errors made by the Patent Office. *See Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d 1318, 1327 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 972 (2001). In this case, the relevant information about similar earlier processes was prominently disclosed in ConAgra's patent application and in the '027 Patent itself. (R. A5265-A5268.)

were assessed at $2,000,000; antitrust damages were assessed at $6,000,000. (J.A. 23a-24a.) Pursuant to Oklahoma law, the interference award was doubled to $4,000,000. (J.A. 26a.) The intentional interference damages were stipulated to be subsumed by the antitrust damages (J.A. 26a.) The district court trebled the antitrust damages (Tr. 1471-1472) and added $1,022,445 in attorneys' fees. (J.A. 28a, 31a.) Judgments were entered totaling approximately $19,000,000. (J.A. 28a-31a.)

E. ConAgra's Post-Trial Motion For A New Trial.

ConAgra had made essentially the same antitrust arguments in its summary judgment motion (J.A. 145a) and its pre-trial brief (J.A. 150a-152a). Its arguments that fraud on the Patent Office had not in fact been "previously determined" were stated in objections to the jury instruction that erroneously took that issue away from the jury. (R. A5886-A5888.) The trial judge had made it clear that she understood and rejected ConAgra's positions on each of these issues and did not want to hear them argued again. (*Id.*; *see also* J.A. 22a.) Tenth Circuit law does not require that a pre-trial Rule 50(a) motion be renewed post-trial under Rule 50(b) to preserve the right to argue sufficiency of the evidence and to seek a remand on appeal, as the Federal Circuit later held. (Pet'r App. 50a n.7.) Accordingly, ConAgra did not renew post-verdict its pre-verdict motion for judgment as a matter of law ("JMOL") under Rule 50(b), believing that to do so would be futile.

However, contrary to the assumption in the Court's formulation of the question presented, ConAgra *did* move for a new trial under Rule 59, or in the alternative for a remittitur. (J.A. 34a, et seq.) ConAgra argued that since there was only one damage analysis, and only one damage

argument, the different awards of $2,000,000 and $6,000,000 could not both be correct. (J.A. 36a-37a.) The court did not instruct the jury not to treble the antitrust damages,[8] and the jury must have found that the actual damages were $2,000,000 and trebled those damages to reach an antitrust award of $6,000,000. (J.A. 23a-24a.) The district court denied ConAgra's motion, then trebled the jury's antitrust award to $18,000,000 (plus attorneys' fees). (J.A. 28a, 31a.)

VI. The Appeal.

ConAgra appealed on the ground, *inter alia*, that Unitherm had failed as a matter of law to prove antitrust standing. As the Federal Circuit acknowledged, controlling Tenth Circuit law "recognizes antitrust standing, like all questions of standing to sue, as a question of law subject to *de novo* review." (Pet'r App. 13a.) The court did not, however, conduct such a review of the evidence to decide the standing issue. Instead, the Federal Circuit based its finding that Unitherm had antitrust standing on the "*allegations*" in Unitherm's complaint, *not* on any evidence. (Pet'r App. 36a, 44a.)

In the very next paragraph of its opinion, the Federal Circuit made this most perplexing statement:

> Despite possessing standing, however, Unitherm never presented any evidence that could possibly support critical factual elements of its claim. In particular, Unitherm failed to present any facts that could allow a reasonable jury to accept

[8] In antitrust cases, "courts have uniformly concluded that mentioning treble damages . . . to the jury is improper." *HBE Leasing Corp. v. Frank*, 22 F.3d 41, 46 (2d Cir. 1994) (collecting cases); *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361, 1371 (10th Cir. 1972).

> either its proposed market definition or its demonstration of antitrust injury. (*Id.*)

The court thus found that Unitherm has antitrust standing, but simultaneously found there was no evidence of antitrust injury, which is an essential condition of antitrust standing. *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 406 (10th Cir. 1992) ("[S]tanding cannot be established without an antitrust injury.").

The court then analyzed Unitherm's antitrust claims in more detail and found that they failed utterly, summarizing:

> In short, Unitherm failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its Section 2 claim. Unitherm has presented conclusory testimony from its expert that defines the market as coterminous with the patent based entirely on issues of *technical* substitutability, described no market analysis, inferred market power from the possession of a patent, tautologically equated unsuccessful attempts at collecting royalties with a dangerous probability of success, and inferred antitrust injury from economic loss. ConAgra is correct in asserting that Unitherm failed to provide any evidence capable of sustaining the jury's finding of antitrust liability. (Pet'r App. 50a) (emphasis in original).

Unitherm argued that these sufficiency-of-the-evidence issues should not be considered at all since ConAgra did not renew its motion for JMOL under Rule 50(b). The Federal Circuit rejected that argument, saying:

> [W]e similarly apply Tenth Circuit law to determine whether or not ConAgra has preserved its right to appeal. In the Tenth Circuit, the failure

> of a party to move for a JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence. . . . The absence of a Rule 50(b) post-verdict motion for JMOL, however, precludes our entering judgment in favor of ConAgra. 'The only remedy available is a new trial.' Thus, we may only vacate the jury's verdict in favor of Unitherm. (Pet'r App. 50a n.7) (citation omitted).

Accordingly, the court affirmed the $4,0000,000 judgment for interference with Unitherm's prospective economic advantage, but remanded the antitrust claim for a new trial. (Pet'r App. 54a.)

SUMMARY OF ARGUMENT

A. It is undisputed that ConAgra challenged the sufficiency of the evidence to support all of Unitherm's claims in the district court, doing so in pre-trial motions and briefs and in two motions for JMOL during the trial. Indeed, ConAgra cited to the district court the very same authorities the Federal Circuit later relied on when it rejected Unitherm's antitrust claim. In short, ConAgra fully and fairly raised its sufficiency of the evidence issue in the district court, and nothing more was required to preserve that issue for appeal. Neither Unitherm nor the Solicitor General suggests that ConAgra obtained any unfair procedural advantage by sandbagging or concealing issues.

Rule 50(b) does not require that a pre-verdict motion for JMOL under Rule 50(a)(2) be renewed post-verdict to preserve rights on appeal. To the contrary, Rule 50(b) expressly provides that where a Rule 50(a) motion at the close of the evidence is not granted, "the court is considered to have submitted the action to the jury subject to the court's later deciding the questions raised by the motion."

Id. Rule 50(b) thus makes clear that the question raised by the Rule 50(a) motion is before the trial court for decision after the verdict *whether or not the motion is renewed.* Rule 50(b) then sets a schedule of ten days within which the movant "may" – not "must" – renew the pre-verdict motion, if it chooses to do so. Not a word in Rule 50 suggests that a party who has made a proper motion for JMOL at the close of all the evidence and before the verdict, as ConAgra did here, loses any right on appeal by not renewing the motion after the verdict.

Unitherm and the Solicitor General argue that requiring a party to renew its motion after the verdict is desirable because it would allow more time for the parties and the district court to analyze the evidence, and *might* result in a reasoned opinion from which an appellate court can benefit. But, desirable or not, there is no such requirement in Rule 50 or anywhere else. The argument is, moreover, wishful thinking. Rule 50(b), even as Unitherm would read it, would not require the parties to file briefs or the district court to prepare findings, conclusions, or an opinion. The decision to consider written briefs or explain on the record why the motion is denied remains right where it has always been under Rule 50(a), committed to the sound discretion of the trial judge.

Unitherm and the Solicitor General rely on older cases decided by this Court, primarily the "trilogy,"[9] suggesting that requiring a Rule 50(b) post-verdict renewal of a motion for JMOL somehow preserves the right of the verdict winner to have the trial court rule on whether a

---

[9] Three decisions of this Court that have often been referred to in this context are *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), and *Johnson v. New York, New Haven & Hartford R.R.*, 344 U.S. 48 (1952).

new trial is called for instead of entering judgment for the movant. However, no such purpose would be served where, as here, the motion for JMOL is ultimately denied. The verdict winner, having survived the motion, does not ask for a new trial and the trial court does not consider that unasked question. Indeed, it is doubtful that the trial court, having concluded that the evidence is sufficient, could meaningfully rule on the question of whether a new trial should be granted without knowing precisely why its conclusion is erroneous. A renewal under Rule 50(b) would, therefore, do nothing to resolve the question of whether a new trial is called for.

The cases of the trilogy cannot be reconciled with denying ConAgra all relief on appeal. In all three cases, the evidence was in fact reviewed for sufficiency on appeal, and in all three cases, there was a remand for further proceedings. The movant under Rule 50(a) who did not renew under Rule 50(b) was not denied relief on appeal, and the non-movant was not allowed to prevail despite the absence of sufficient evidence.

To bring logic, reason, and clarity to the law in this area, this Court should hold that (1) when sufficiency of the evidence has been fairly raised in the district court by a proper Rule 50(a) motion at the close of all the evidence, that issue is fully preserved for appeal; and (2) the court of appeals can then examine the evidence and order any appropriate disposition, including entry of judgment, remand for a new trial, or other proceedings. Such a holding would conform to the established rule that governs preservation of other issues for appeal and would recognize the express statutory appellate authority conferred by 28 U.S.C. § 2106. This holding would also be fully consistent with the language of Rule 50, and it would avoid judicial creation of a formalistic procedural trap.

B. If Unitherm's proposed interpretation of Rule 50(b) is adopted, it should not be applied retroactively to this case or other open cases in circuits that have not heretofore required post-verdict renewal. Although this Court's precedents leave open many questions relating to retroactivity, the concept that certain decisions are to be applied prospectively only is well established. A decision that relates to the conduct of the trial and has no constitutional underpinnings presents the strongest possible argument against retroactivity.

Litigants should be entitled to rely on long-standing procedural precedents of the circuit in which the case is tried. ConAgra should not, therefore, lose its right to appeal, and Unitherm, which suffered no antitrust injury, should not reap a windfall because a rule of procedure has been changed after the trial. Taking away ConAgra's right to appeal based on a retroactive rule would be especially inequitable and unfair here because, as the Solicitor General admits, the rule applied by the Federal Circuit in this case is consistent with the prior decisions of this Court. (Amicus Br. 20, 24.)

C. Even if the Court adopts Unitherm's interpretation of Rule 50(b) and applies this interpretation retroactively, the Court should nevertheless review or remand the issue of antitrust liability to correct plain error. As the Federal Circuit made clear, Unitherm not only failed to present evidence sufficient to support the jury verdict, it failed to offer *any* evidence capable of supporting three elements of antitrust liability: proof of a relevant antitrust market, of a dangerous likelihood of success in monopolizing that market, or that ConAgra's alleged monopolistic behavior caused Unitherm any antitrust injury. (Pet'r App. 50a.) The district court committed plain error when it allowed the case to go to the jury and when it entered judgment, the absence of any supporting evidence being so

readily apparent. To allow judgment to stand without any supporting evidence would work a manifest injustice.

ARGUMENT

I. ConAgra Preserved Sufficiency Of The Evidence As An Issue For Appeal.

A. ConAgra Complied With The General Rule That Permits Only Issues Raised Below To Be Appealed.

The Solicitor General correctly notes that, "[o]rdinarily an appellate court does not give consideration to issues not raised below." (Amicus Br. 8.) It is equally true, however, that an appellate court *does* give consideration to an issue that *was* raised below. *Hartford Courant Co. v. Pellegrino*, 371 F.3d 49, 56-57 (2d Cir. 2004); 19 James Wm. Moore et al., *Moore's Federal Practice* § 205.05[1] (3d ed. 2005) ("an issue is 'pressed or passed on below' when it fairly appears in the record as having been raised or decided."). An issue need not be raised in any particular way, and it need not be raised more than once, although it must be raised in such a manner that the trial judge has an adequate opportunity to understand and rule on it. *Id.*, § 205.05[1], n.4. This general rule prevents a litigant from burdening the appellate courts and unfairly surprising an opponent with any issue not adequately raised below. The appellate courts determine, on a case-by-case basis, whether this requirement has been met. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The general rule certainly does not suggest that Rule 50(b) should be read to require – not merely permit – a post-verdict renewal of a Rule 50(a)(2) motion. Indeed, the general

rule renders such an interpretation of Rule 50(b) superfluous and pointlessly formalistic.[10]

ConAgra complied with the general rule, identifying early on the precise points on which Unitherm's antitrust evidence was insufficient: there was no market for browning processes (J.A. 150a) and no market of any description in which Unitherm and ConAgra were competitors. (J.A. 139a.) The issue here was raised in ConAgra's motion for summary judgment and again in its pre-trial brief. (J.A. 139a-143a; J.A. 148a-152a.) Not only was it raised, but the relevant antitrust authorities that were cited and quoted are the same cases on which the Federal Circuit ultimately relied.[11] (Pet'r App. 41a-52a.)

ConAgra also raised the issue by two oral motions for judgment, at the close of Unitherm's case and at the close of all the evidence. (J.A. 15a-16a, 22a.) The district court, knowing that the issues before it then were precisely the same issues that had already been briefed extensively,

---

[10] There is good reason to follow the general rule where an issue is raised for the first time on appeal:

> [R]eview of issues not raised below "would . . . require us to frequently remand for additional evidence gathering and findings," *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970-71 (10th Cir. 1991); would undermine the "need for finality in litigation and conservation of judicial resources," *id.* at 971; would often "have this court hold everything accomplished below for naught," *Bradford v. United States*, 651 F.2d 700, 704 (10th Cir. 1981); and would often allow "[a] party . . . to raise [a] new issue on appeal [when that party] invited the alleged error below." *Id.*

Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 721 (10th Cir. 1993).

[11] It is not surprising, in view of Fed. R. Civ. P. 26 and other discovery devices, that ConAgra, like many other litigants, was able to identify and brief dispositive lack-of-evidence issues before the trial began, or that the trial judge considered these issues and reached its conclusions early in the trial, if not before the trial.

denied those motions without allowing for further argument. (*Id.*; *see* R. A2893; J.A. 147a-152a.) There is no doubt that ConAgra's various motions, briefs and arguments on the sufficiency of Unitherm's antitrust evidence satisfied the general rule for fully preserving appellate issues. (*Id.*)

B. ConAgra Complied With Rule 50.

The Federal Rules of Civil Procedure should be given their "plain meaning." *Bus. Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 540 (1991). Nothing in Rule 50 creates an exception to the general rule requiring a party to make a post-verdict motion under Rule 50(b) to preserve the right to argue sufficiency of the evidence on appeal. Indeed, Rule 50(b) does not require a motion to be made for any purpose, but simply provides that, "the movant *may* renew its request for judgment as a matter of law by filing such a motion not later than 10 days after entry of judgment." *Id.* (emphasis added). If the movant desires to renew, a ten-day period is allowed for that renewal. The Rule does not make renewal mandatory or a condition of review on appeal. It says nothing about an appeal. Unitherm's and the Solicitor General's position is contrary to the plain meaning Rule 50(b).[12]

[12] Until the trilogy, every court of appeals decision had read the new Rule 50(b) as permitting not only review of the sufficiency of the evidence in the absence of a post-verdict motion, but also the power to enter judgment for the verdict loser. Theodore Garver, Note, Johnson v. N.Y., N.H. & H.R.R. Co., *344 U.S. 48 (1952)*, 38 Cornell L.Q. 449, 450 n.9 (1952-1953) (collecting nine cases between 1940 and 1947, and citing 3 *Moore's Federal Practice* § 115 (Supp. 1947) for the same proposition).

Rule 50(b) declares that once a pre-verdict motion under Rule 50(a)(2) has been made "the court is considered to have submitted the action to the jury *subject to the court's later deciding the legal question raised by the motion.*" *Id.* (emphasis added). The rule does not say "subject to the court's later deciding the legal questions raised by the motion, but only if the motion is renewed." Even where, as here, the trial court formally denies the motion before the jury retires, the motion remains pending and the movant need do nothing more. *Johnson*, 344 U.S. at 53 (it is "wholly unnecessary for a judge to make an express reservation of his decision. . . . The rule itself made the reservation automatic."). Thus, there is no need to mandate renewal of the motion for JMOL after verdict because Rule 50(b) itself expressly preserves the issue for decision after verdict.[13]

The Solicitor General acknowledges that Rule 50(b) expressly treats any denial of a Rule 50(a) motion as a reservation of the decision until later. (Amicus Br. 15.) The Solicitor General then argues that Rule 50(b), "specifies the procedural mechanism by which that 'later decision' is to be made." (*Id.*) Therefore, the Solicitor General concludes, "if a party declines to renew its motion after the verdict, it has waived its right to obtain a final ruling from the district court on the sufficiency of the evidence, and accordingly should not be permitted to raise that issue on appeal." (*Id.*) This argument is a *non sequitur* that distorts the rule and ignores the law. Since the decision on the Rule 50(a) motion is automatically reserved until after the

[13] Of course, renewing the motion after the verdict may be helpful and appropriate in a particular case, so the rule properly authorizes it and specifies the timing.

verdict, it makes no sense to require a party to do something more to *really* reserve it. If the Solicitor General's conclusion were correct, then the Rule would not have expressly reserved the issue in the first place. And, if the Rule intended the draconian waiver of the right to appeal the Solicitor General posits, surely it would have said that Rule 50(b) motion "must," not "may," be made.

The problem with the Solicitor General's reasoning is highlighted by the fact that courts often *do* render a final decision on the sufficiency of the evidence after the verdict without a Rule 50(b) motion by deciding the reserved Rule 50(a) motion.[14] The Eleventh and Seventh Circuits, for example, hold that the district court can grant a Rule 50(a)(2) motion *post-verdict* without a renewal under Rule 50(b). *See Norton*, 806 F.2d at 1547 and *Shaw*, 249 F.2d at 439. The Federal Circuit, which follows Unitherm's interpretation of Rule 50(b), similarly notes that the district court can grant a 50(a)(2) motion *sua sponte after the verdict* and without a Rule 50(b) renewal, even though it would not permit the movant to appeal the denial of a 50(a)(2) motion without a Rule 50(b) renewal. *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 861 (Fed. Cir. 1991), *cert. denied*, 504 U.S. 980 (1992).

Requiring a renewed motion for JMOL creates an anomalous and illogical situation. After the verdict is

[14] *See, e.g., Norton v. Snapper Power Equip.*, 806 F.2d 1545, 1547 (11th Cir. 1987); *Shaw v. Edward Hines Lumber Co.*, 249 F.2d 434, 439 (7th Cir. 1957); *First Safe Deposit Nat'l Bank v. Western Union Tel. Co.*, 337 F.2d 743, 746 (1st Cir. 1964); *Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, 355-56 (5th Cir. 1985); *Mosser v. Fruehauf Corp.*, 940 F.2d 77, 83 n.2 (4th Cir. 1991). Although these cases treat instances where the trial court reserved its ruling on the Rule 50(a) motion, again, such an express reservation is not required since the Rule renders the reservation automatic. *Johnson*, 344 U.S. at 53.

returned, the pre-verdict motion for JMOL is still pending and can be granted. When that happens, the verdict winner can appeal the grant. But if the district court denies the motion, or enters judgment against the movant – thereby implicitly denying the motion – the movant cannot appeal. That is bad enough. But what if the district court enters a separate order denying the motion *after the verdict* and writes a lengthy opinion explaining the denial? Are we to suppose that the movant still cannot appeal this denial because it did not renew before the denial? Apparently so. The Solicitor General never comes to grips with any of these problems.

The Solicitor General also argues that a Rule 50(b) motion should be required to preserve sufficiency of the evidence for appeal because district courts have discretion to deny even meritorious Rule 50(a) motions to obtain the practical benefits of a jury verdict. (Amicus Br. 11.) Therefore, the Solicitor General reasons, a district court's denial of a motion under Rule 50(a) cannot be a reversible error even if the evidence is insufficient. (Amicus Br. 18-19.) This argument is based on an erroneous assumption and a misunderstanding of the operation of the Rule.

There is no authority for the proposition that a court has "discretion" to permit a verdict to stand without sufficient supporting evidence. The trial court does have discretion to decline to rule before taking a verdict, and Rule 50(b) provides that the motion is still pending after the verdict, whether or not ruled on earlier. The Rule 50(a) motion can then be granted or finally denied post-verdict (as by entering judgment), but ultimately the final disposition of a Rule 50(a) motion cannot be a matter of discretion.

C. Distorting Rule 50(b) To Require Post-Verdict Renewal Of The Motion For JMOL Serves No Useful Purpose.

Unitherm and the Solicitor General both argue that a post-verdict motion is desirable (Pet'r Br. 25-26; Amicus Br. 15-18), but neither explains how this perceived desirability can trump the plain language of Rule 50(b). The argument that they make is not so much that there actually *is* such a rule, but that they think there *should be* such a rule.

Nor is it apparent that requiring a post-verdict renewal would achieve the benefits ascribed to this requirement. The Solicitor General asserts that making post-verdict Rule 50(b) motions mandatory "ensures that the district court has an adequate opportunity to resolve the sufficiency of the evidence issue in the first instance." (Amicus Br. 7.) However, the trial court can take whatever time is desired for reflection, listen to oral argument, order that briefs be filed and make a record of why the motion has been denied or granted *whether or not a motion for JMOL is renewed after the verdict.* It can also choose to do none of these things, but the available options are in no way changed by requiring the renewal of a motion that is already pending and remains pending until judgment is entered.

The facts of this case highlight the fallacy in Unitherm's argument and assumptions. If the district court did not have an adequate opportunity to consider ConAgra's motion for JMOL, why did it decline to hear argument and summarily deny the motion ConAgra made before the verdict? (J.A. 22a.) The evidence was all in and court was not compelled to decide anything at that time. It could have deferred its decision and asked for briefs. The obvious fact is, the court had heard all it wanted to hear

and had made up its mind on the issue. A post-verdict renewal of the Rule 50(a) motion by ConAgra would not have induced the court to hear argument and would have changed nothing.

Neither Unitherm nor the Solicitor General explains why the Court should require renewal of a motion for JMOL, but not require renewal of other motions. For example, motions to exclude crucial evidence, excuse a juror, or declare a mistrial all could be critical to the case and require reversal on appeal. Counsel may or may not renew such a motion after the verdict, and the court may or may not permit further argument or receive briefs. But renewal is not required to preserve the issue for appeal. We depend upon counsel to raise the issue, and we depend upon the trial court to make an appropriate record of reasons for denial (or grant). The general rule requiring that issues be raised in the trial court to preserve them for appeal suffices.

Unitherm, citing *Biodex*, also argues that requiring a post-verdict renewal of the motion would eliminate unnecessary appeals by giving the trial court a "chance" to correct an error. (Pet'r Br. 22.) Of course, the district court already has the same "chance" by reason of the Rule 50(a) motion, which is reserved for decision after the verdict. And, the assumption that more grants of JMOL would reduce the number of appeals is fanciful. All that would do is change the identity of the appellant.

If the need for a renewed motion for JMOL were as important to the proper functioning of the judicial system as Unitherm and the Solicitor General would have it, appellate courts lacking such a requirement would have suffered as a result. There is, however, no reason to believe that they have. The Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits, for example, have long held

that a renewed motion for JMOL is not needed to review sufficiency of the evidence on appeal. Yet there is no indication that any problem has resulted. *See, e.g.*, *Dichmann, Wright & Pugh, Inc. v. Weade*, 168 F.2d 914, 916-17 (4th Cir. 1948), *aff'd as modified*, 337 U.S. 801 (1949); *Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996); *Yorkshire Indem. Co. v. Roosth & Genecov Prod. Co.*, 252 F.2d 650, 657-58 (5th Cir. 1958); *Castellano v. Fragozo*, 311 F.3d 689, 704 (5th Cir. 2002);[15] *Hansen v. Vidal*, 237 F.2d 453, 454 (10th Cir. 1956); *Cummings v. General Motors Corp.*, 365 F.3d 944, 950 n.1 (10th Cir. 2004); *United States v. Valdosta-Lowndes County Hosp. Auth.*, 696 F.2d 911, 912-13 (11th Cir. 1983); *Harbor Ins. Co. v. Schnabel Foundation Co.*, 946 F.2d 930, 935-37 (D.C. Cir. 1991), *cert. denied*, 504 U.S. 931 (overruling a prior case affording only plain error review in the

[15] Unitherm cites *Adames v. Perez*, 331 F.3d 508, 511-12 (5th Cir. 2003) for the proposition that the Fifth Circuit follows the majority rule. (Pet'r Br. 10, quoting *Cummings v. General Motors Corp.*, 365 F.3d 944, 950 n.1 (10th Cir. 2004).) But *Adames* is not controlling law in that circuit. First, it conflicts with a long line of Fifth Circuit precedent that adheres to the holding in the trilogy where appellate review for sufficiency was permitted, but relief was limited to remand for a new trial. Since the Fifth Circuit follows the rule that a panel cannot overrule a prior panel absent an en banc proceeding or intervening Supreme Court case, *Adames* is not controlling. *United States v. Lipscomb*, 299 F.3d 303, 313 n.34 (5th Cir. 2002) (quoting *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision.")). Second, the only authority *Adames* cites to is *United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 960 (5th Cir. 1998), a case where the litigant did not move for JMOL *at trial* under Rule 50(a). Thus, *Adames* is unprecedented in the Fifth Circuit.

absence of a renewed motion under Rule 50(b) as "wrongly decided").[16]

Similarly, Alaska's Rule 50(b) provides that "a party who has moved for a directed verdict *may* move to have the verdict and any judgment thereon set aside." Alaska R. Civ. P. 50(b) (emphasis added). The movant is not, however, *required* to make that second motion to fully preserve its rights on appeal. *Sherbahn v. Kerkove*, 987 P.2d 195, 198 n.5 (Alaska 1999). In Alaska, "may" means may, not "must." New Jersey Court Rule 4:40-2 provides that "[f]ailure to renew the motion shall not preclude appellate review of the denial of the motion made at trial." Idaho Rule of Civil Procedure 50(b) goes even further, permitting

[16] The holding in the trilogy used to be the majority rule, followed in nine circuits. In addition to the Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits, four other circuits have adhered to it at some time in the past, especially in the period nearest the trilogy. In the Second Circuit, *see, e.g.*, *Guarnieri v. Kewanee-Ross Corp.*, 270 F.2d 575, 580 (2d Cir. 1959). The Third Circuit opinion in *Woods v. Nat'l Life & Accident Ins. Co.*, 347 F.2d 760, 769 (3d Cir. 1965) is cited by Unitherm as standing for the majority rule, when, in fact, its holding is in line with the trilogy in that it only limited the appellate court to a remand for new trial and did not prohibit appellate review of the sufficiency of the evidence. (Pet'r Br. 10) (quoting *Cummings*, 365 F.3d at 950 n.1). The Sixth Circuit followed the trilogy in *Union News Co. v. Hildreth*, 295 F.2d 658, 667 (6th Cir. 1961), *cert. denied*, 375 U.S. 826 (1963) and *Aquionics Acceptance Corp. v. Kollar*, 536 F.2d 712, 713 (6th Cir. 1976). There appears to be an unacknowledged internal split in the Eighth Circuit. *See, e.g.*, *Coffman v. Trickey*, 884 F.2d 1057, 1063-64 (8th Cir. 1989) (allowing review for sufficiency on appeal, but limiting relief to remand for a new trial); *but see, e.g.*, *Cross v. Cleaver*, 142 F.3d 1059, 1069-70 (8th Cir. 1998) (erroneously citing as authority cases where no Rule 50(a)(2) motion was made at the close of all evidence). Even the Federal Circuit arguably followed the trilogy holding in *Sun Studs, Inc. v. ATA Equip. Leasing, Inc.*, 872 F.2d 978, 995 (1989), *overruled on other grounds by A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (the court in *Biodex* arguing that the rule applied in *Sun Studs* is dicta at 946 F.2d at 855 n.4).

appellate review of sufficiency of the evidence without *any* motion at trial or thereafter:

> The failure of a party to move for a directed verdict, for a judgment notwithstanding the verdict or for a new trial shall not preclude appellate review of the sufficiency of the evidence when proper assignment of error is made in the appellate court.

Id. Unitherm and the Solicitor General describe problems that don't exist and prescribe a remedy that is not needed and will not cure. This rewriting of the rule would create an unwise and unfair exception to the general principal found in 28 U.S.C. § 2106 that any judgment, decree or order is available on appeal. *See Neely v. Eby Constr. Co.*, 386 U.S. 317, 322 (1967); *Weisgram v. Marley Co.*, 528 U.S. 440, 450 (2000).

D. This Court's Rule 50(b) Cases Support The Federal Circuit's Remand For A New Trial.

This Court addressed the question of whether a renewal of a motion for JMOL is required by Rule 50(b) in the so-called "trilogy," a series of cases authored by Justice Black more than half a century ago when Rule 50 took a different form. *Cone,* 330 U.S. 212; *Globe Liquor*, 332 U.S. 571; *Johnson,* 344 U.S. 48. Subsequent court of appeals cases cited by Unitherm and the Solicitor General requiring a renewal of a Rule 50(a) motion often focus not on the words of Rule 50(b) itself, but on a misreading of the trilogy. (*E.g.,* Pet'r Br. 20-22.)

In *Cone*, the defendant moved for a directed verdict and for a new trial, but did not move for judgment post-verdict. The court of appeals found the evidence insufficient and directed that judgment be entered for the defendant. *West Virginia Pulp & Paper Co. v. Cone*, 153 F.2d 576, 582 (4th Cir. 1946), *aff'd as modified*, 330 U.S. 212 (1947). This Court held that the choice between entry of judgment or a new trial should be made by the trial court because only the trial judge, "can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses." 330 U.S. at 216. An appellate court cannot do so and, therefore, should defer to the trial judge. Justice Black apparently attributed the absence of a ruling by the trial judge to the fact that "[r]espondent did not move for 'judgment notwithstanding the verdict,' as it might have under Rule 50(b)." *Id.* at 213. *Cone* does not explain, however, how such a post-verdict motion would have alleviated Justice Black's concern. The trial court would have no reason to consider a new trial no matter how many times the defendant's motion for JMOL were made and denied.

Although the opinion in *Cone* ends with the word "reversed," the subsequent history of the case reveals that the movant was not denied relief.[17] Consistent with the decision by the Federal Circuit here, *Cone* was, in fact, remanded for further proceedings below.

A year after *Cone* was decided, a similar fact pattern was presented in *Globe Liquor*. Justice Black again focused on the "importance of having the District Court first pass upon whether its error [in denying the pre-verdict motion] should result in a new trial or in a judgment finally ending the controversy." 332 U.S. at 573. *Globe Liquor* again suggests that a post-trial motion under Rule

[17] Upon remand, the trial court conducted a new trial and entered JNOV for the defendant after the plaintiff put on evidence nearly identical to what it had offered in the first trial. *Cone v. West Virginia Pulp & Paper Co.*, 170 F.2d 770, 773 (4th Cir. 1948). The Fourth Circuit affirmed on appeal. *Id.* at 772, 774.

50(b) would have solved this problem, but again does not explain *how*. The case was remanded for a new trial. Again, Justice Black did not prohibit or even question appellate review of the sufficiency of the evidence, but instead endorsed it, although limiting the lower court's remedial power to remand for a new trial. 332 U.S. at 574.

Johnson, the last case of the trilogy, was a wrongful death action against a railroad. When all the evidence was in, the railroad moved to dismiss. After losing at trial, the railroad moved to "set aside" the verdict on the ground that it was contrary to the weight of the evidence. 344 U.S. at 49. The court of appeals found the evidence insufficient and reversed with direction to enter judgment for the railroad. This Court concluded that because the motion, although post-verdict, was "one to set aside the verdict – not one to enter judgment notwithstanding the verdict," the dismissal could not be sustained. *Id.* at 51. The case was remanded "for further proceedings consistent with this opinion." *Id.* at 55. As with *Cone*, the plaintiff presented much the same evidence upon retrial, and the district court entered JNOV for the defendant upon a proper Rule 50(b) motion made after plaintiff won a second jury verdict.[18] Thus, in *Johnson*, as in *Cone* and *Globe Liquor*, this Court proceeded according to the rule later followed by the Tenth Circuit and applied here by the Federal Circuit. The plaintiff with insufficient evidence was not allowed to prevail.

A dissent by Justice Frankfurter in *Johnson*, joined by three other Justices, said that this Court's earlier precedents did not require following a "ritualistic formula in the

[18] *Johnson v. Palmer*, 129 F. Supp. 202 (E.D.N.Y. 1953), *aff'd sub nom. Johnson v. New York, New Haven & Hartford R.R.*, 220 F.2d 279 (2d Cir.), *cert. denied*, 349 U.S. 954 (1955).

District Court." 344 U.S. at 57. Referring to earlier cases in which there was a remand for a new trial, Justice Frankfurter said they were remanded instead of having judgment entered because, "the Court of Appeals either applied to the facts a legal theory other than the one on which the parties proceeded in the trial court, or for the first time assigned decisive importance to the choice by the losing party of a legal theory on which to claim or resist recovery." *Id.* at 58.

The trilogy thus stood for the proposition that, in the absence of a renewal under Rule 50(b) of a motion to enter judgment contrary to the verdict, an appellate court can remand, but cannot enter judgment against the verdict. No case of the trilogy held or was even reconcilable with a rule that sufficiency of the evidence should not be reviewed at all in the absence of a Rule 50(b) motion.

The question of whether to enter judgment or remand was, however, addressed more recently by this Court in *Neely*. Using 28 U.S.C. § 2106 as a starting point, this Court held:

> But these considerations [favoring the exercise of discretion by the trial judge] do not justify an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary retrials. Nor do any of our cases mandate such a rule.

386 U.S. at 326.

Neely thus discards the basic rationale underlying the trilogy and holds that, in appropriate circumstances, an appellate court can itself grant a motion to dismiss based on the sufficiency of the evidence and need not remand. Justice Black dissented, arguing that "a court of appeals,

in reversing a trial court's refusal to enter judgment on the grounds of insufficiency of evidence, is entirely powerless to order the trial court to dismiss the case, thus depriving the verdict winner of any opportunity to present a motion for a new trial to the trial judge. . . . " *Id.* at 331. However, all the members of this Court in *Neely*, including Justice Black, seemed to reject the notion that a post-trial renewal of a motion for JMOL (or a directed verdict) will somehow make the trial judge's wisdom on the question of the need for a new trial available to the appellate court.

Neely, however, contains dicta that "[t]he opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved." *Id.* at 325. This vestige of the trilogy does not support the proposition that no remedy at all is available in the absence of a Rule 50(b) renewal. Indeed, it implies just the opposite, that a remand is proper. Most of the opinion in *Neely* concerns the question of when to enter judgment and when to remand. It would be implausible to argue that when *Neely* says "may not order judgment n.o.v.," it really means "may not order judgment n.o.v. *or remand*." If the dicta in *Neely* is accepted as binding, it supports the Tenth Circuit rule as applied by the Federal Circuit in this case.

In *Weisgram*, the basic holding of *Neely* was reaffirmed.

> *Neely* recognized that there are myriad situations in which the determination whether a new trial is in order is best made by the trial judge. 386 U.S., at 325-326. *Neely* held, however, that there are also cases in which a court of appeals may appropriately instruct the district court to enter judgment as a matter of law against the jury-verdict winner. Id. at 326. We adhere to *Neely's* holding and rationale. . . .

Id. at 456-457 (parallel citations omitted). *Weisgram* thus again decoupled the question of the need for a new trial from the renewal of a pre-verdict motion under Rule 50(b).

The Solicitor General argues that "a strong *stare decisis* effect" requires a holding that a renewal under Rule 50(b) is necessary to preserve any right of appeal. (Amicus Br. 20.) This argument is erroneously based not only on the trilogy, but on the Advisory Committee's Note to the 1963 amendment to Rule 50 that states: "[t]he amendments do not alter the effects of a jury verdict or the scope of appellate review." Fed. R. Civ. P. 50 advisory committee's note on 1963 amendment. However, in 1963, there was already a split among the circuits. The rule followed by the Federal Circuit in this case had been adopted in the Tenth Circuit and other circuits, and, indeed, appears to have been the majority rule at the time.[19] There is no reason to conclude that the 1963

---

[19] *See, e.g., Hansen*, 237 F.2d at 454 (appellate power limited to remand for new trial upon finding evidence insufficient); *Brown v. Alkire*, 295 F.2d 411, 414 (10th Cir. 1961); *Dunlop Tire and Rubber Corp. v. Thompson*, 273 F.2d 396, 401 (8th Cir. 1959) (same rule); *Local 978 United Bhd. of Carpenters & Joiners v. Markwell*, 305 F.2d 38, 48 (8th Cir. 1962) (dictum; same); *Yorkshire*, 252 F.2d at 657-58 (in light of the trilogy, in the absence of a Rule 50(b) motion "the case must be remanded for what under the circumstances would appear to be the useless formality of another trial") (quoting *Garman v. Metro. Life Ins. Co.*, 175 F.2d 24, 28 (3d Cir. 1949)); *Union News*, 295 F.2d at 667; *Guarnieri*, 270 F.2d at 580; *see also* cases cited *supra* note 16; *but see American Paint Svc. v. Home Ins. Co. of N.Y.*, 246 F.2d 91, 93 (3d Cir. 1957) ("American did not renew its motion after the jury's verdict as it was required to do in order for this Court to pass on the legal sufficiency of the evidence."); *Mickey v. Tremco Mfg. Co.*, 226 F.2d 956, 957 (7th Cir. 1955) (untimely motion for JNOV and new trial precludes appellate review of the same).

amendment was intended to choose one pre-existing interpretation of the rule over another. Certainly, the quoted comment indicates that the 1963 amendment was not intended to change the decisions in the cases of the trilogy, all of which were remanded for retrial.

The Solicitor General also argues that there are procedures for amending the Rules of Civil Procedure and that those procedures should be followed if the rules are to be changed. (Amicus Br. 25.) It is, however, the Solicitor General and Unitherm who want to change the rules by "interpretation." ConAgra advocates following the rules as written, there being nothing in Rule 50(b) that conditions the right of appeal on the post-verdict renewal of a Rule 50(a)(2) motion.

E. Rule 50(b) Should Be Interpreted As Written.

Neely and *Weisgram* have rejected the logical underpinnings of the trilogy. The question of whether to dismiss or remand to the district court for consideration of the possible need for a new trial now depends on the circumstances of the particular case, not the post-verdict renewal of a motion previously made. *Neely*, 386 U.S. at 325-26; *Weisgram*, 528 U.S. at 454-55. The unsound idea that a post-verdict renewal of a motion for JMOL somehow results in the trial judge passing on the need for a new trial has been abandoned. The trilogy continues, however, to distort the interpretation of Rule 50 to no good purpose, attaching an unwarranted importance to the renewal of a pending motion for JMOL.

The Tenth Circuit interpretation, which was followed here, permits review for sufficiency of the evidence and a remand to the district court, but does not permit a direction to enter judgment in the absence of a post-verdict Rule 50(b) motion. The Solicitor General agrees with

ConAgra that this practice is consistent with the trilogy. (Amicus Br. 24.) If this Court feels constrained by these precedents, this is the best alternative available. It would be better, however, to adopt a new interpretation, returning to the words of Rule 50 and recognizing that renewal after the verdict is not a prerequisite to a dismissal by an appellate court, and that all rights on appeal are fully preserved by a motion for JMOL under Rule 50(a)(2) at the close of all the evidence. This interpretation would also bring the practice into harmony with 28 U.S.C. § 2106 (an appellate court "may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").[20]

The rule adopted in some circuits, that sufficiency of the evidence review is precluded on appeal unless a motion for JMOL has been made before the verdict and then renewed post-verdict, has little to recommend it. It imposes on litigants and the courts a need to engage in pointless formalities not required by the rules as written. It does violence to the rules, while failing to accomplish its purported objective.

II. If A Rule More Stringent Than That Of The Tenth Circuit Is Adopted, It Should Not Be Applied Retroactively In This Case.

This Court last considered whether to give a decision retroactive effect in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). *Harper* held that when a ruling by

---

[20] At minimum, of course, there should always be an exception where a party can show that a renewed motion after the verdict would have been futile. That was clearly the case here.

this Court is applied retroactively to the parties before it, that ruling must be applied in all open cases.[21] There were five opinions in *Harper*. All but Justice Scalia's concurring opinion at least implicitly recognized that not every rule of law announced by this Court should have retroactive effect. The Court divided mainly on the question of how to determine whether a particular ruling should be applied retroactively in other cases. Justice Kennedy, joined by Justice White, said that sometimes a rule should be applied only prospectively "'to avoid injustice or hardship to civil litigants who have justifiably relied on prior law.'" *Id.* at 109 (quoting *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 197 (1990)). Justice O'Connor's dissent, joined by the Chief Justice, said: "[W]hether a decision will be nonretroactive depends on whether it announces a new rule, whether prospectivity would undermine the purposes of the rule, and whether retroactive application would produce injustice." *Id.* at 113-14.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), followed by some Justices in *Harper*, held that the interpretation of a statute of limitations announced in an earlier case should not be applied retroactively. *Chevron* sets forth three factors to be considered in this regard. *Id.* at 106. All three confirm that a decision in this case should not be applied retroactively. *First*, would the decision establish a "new principle of law . . . by overruling clear precedent on which litigants may have relied . . . ?" *Id.* at 106. In this case, it would not. The Tenth Circuit rule was well-settled and followed this Court's precedent in the trilogy. *Second*, would prospective application "further or retard [the]

[21] Eight justices joined in Part II of this opinion, which is the relevant part for present purposes.

operation" of the rule in question? *Id.* at 106-07. Prospective application would not retard operation of a new rule because very few cases will be exempted from the rule. *Third*, would non-retroactivity result in "injustice or hardship"? *Id.* at 107. It would not. Unitherm knew the basis for ConAgra's motion and was not prejudiced in any way. (J.A. 15a-22a, 139a-143a, 148a-152a.)

American Trucking, *supra*, applied the three *Chevron* factors to determine whether a decision that a state tax law was unconstitutional should be applied retroactively. This Court held that it should not because "state tax collecting authorities would have been justified in relying on state enactments valid under then-current precedents of this Court. . . . " 496 U.S. at 182. The state was, therefore, allowed to keep tax revenues to which it was not constitutionally entitled. The case for non-retroactivity is stronger here. ConAgra does not seek to keep anything that rightfully belongs to Unitherm.

This case differs from this Court's leading precedents on retroactivity in that the issue here is purely procedural. If any rule should be applied prospectively only, a procedural rule should fall in that category. When it comes to matters of trial procedure, the litigants must be able to rely on the law of the circuit where the case is tried. Otherwise, trials would be chaotic and prolonged. Counsel would be compelled to take positions called for under the law of *any* circuit, or any law that might be announced in the future when, for example, laying foundations for evidence, objecting to jury instructions, proposing jury instructions, and excusing jurors. Any formality required anywhere would be observed in every case for fear that, in the future, it might be recognized as a requirement in all cases.

Moreover, prospective application of the rule announced in this case would not violate the distinction between the judicial and legislative power, a concern that has been raised in earlier cases. *See Harper,* 509 U.S. at 108 (Scalia, J., concurring) (prospective decision-making has been criticized as "remov[ing] 'one of the great inherent restraints upon this Court's depart[ing] from the field of interpretation to enter that of lawmaking'"). Where, as here, the rule at issue concerns solely a matter of trial procedure, there is no reason why the Court should not engage in lawmaking by announcing a "new" rule to be applied only to future cases. As the Solicitor General recognizes, regulation of purely procedural matters is delegated to this Court by Congress under 28 U.S.C. § 2072(a). (Amicus Br. 25) (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941)). This Court has recognized that its own powers include the power to both promulgate and interpret the Rules. *See Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946) ("The fact that this Court promulgated the [Rules] as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency.") While Congress has the power to take action to alter or reject a rule promulgated by the Supreme Court, it has never done so with respect to Rule 50(b) or its proposed and actual amendments. A rule governing a matter of pure trial procedure would not overstep the bounds of the Court's powers.

Accordingly, if this Court were to announce a rule that is stricter than the well-settled Tenth Circuit rule that governed the trial below, that rule should not apply retroactively to deprive ConAgra of its right to appeal. To do so would work a substantial injustice on ConAgra, particularly since the rule ConAgra relied on was consistent with this Court's own precedents.

III. ConAgra's Rule 50(A) Motion Was Sufficient.

Unitherm goes well beyond the scope of its own petition for certiorari and this Court's grant of that petition by attacking the sufficiency of ConAgra's *pre-verdict* motion for JMOL under Rule 50(a). (Pet'r Br. 38.) The Federal Circuit rejected this argument twice, first in its opinion and again when it denied Unitherm's petition for rehearing. (Pet'r App. 50a n.7, 55a-56a.) In any event, ConAgra's JMOL motion was more than sufficient to preserve the district court's error in permitting the jury to decide the antitrust claim.

Unitherm's argument seems to be that, even though the basis for ConAgra's motion had been explained in detail in its summary judgment motion (J.A. 139a-143a) and pre-trial brief (J.A. 148a-152a), and the motion itself was made properly at the close of plaintiff's case and after close of all the evidence (J.A. 15a-22a), the motion was nevertheless defective because the grounds for the motion were not repeated when the motion was made orally. (Pet'r Br. 4-5.) Unitherm ignores that the motion was expressly stated to be based on the same grounds previously argued, that ConAgra sought permission to argue the motion again "for the record," and that the trial judge cut off debate and denied the motion. (J.A. 22a.) No more was required.

The purpose of Rule 50(a) is served when the trial judge and the parties understand the asserted evidentiary deficiencies, whether from the motion itself, other portions of the record, or earlier filed briefs.[22] Further, where the

---

[22] *Gaus v. Conair Corp.*, 363 F.3d 1284 (Fed. Cir. 2004) (en banc) (defendant's "terse – even cryptic" statement of grounds for JMOL was sufficient where issues were briefed in summary judgment motion); *Lynch v. City of Boston*, 180 F.3d 1, 13 n.9 (1st Cir. 1999) (issue briefed

(Continued on following page)

details of a motion are offered "for the record," but are not stated because the trial judge declined to allow the argument, the movant should not be held responsible or penalized. *See Motorola, Inc. v. Interdigital Tech. Corp.*, 930 F.Supp. 952, 960 (D. Del. 1996), *aff'd in part, rev'd in part*, 121 F.3d 1461 (Fed. Cir. 1997).[23] Finally, where the plaintiff could not have augmented its proof in any event, no prejudice results from a motion that is stated in general

---

in summary judgment motion, pre-trial memorandum, and with respect to special verdict forms); *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125, 136 (2d Cir. 1999) (motion sufficient "when viewed in context of the entire colloquy" and where "defense counsel moved for summary judgment on same ground"); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 832 (3d Cir. 1983) ("despite the imprecision" of 50(a) motion, "plaintiff's counsel and the court understood and responded to defendants' counsel as well as if he had been more specific at the time"); *Nat'l Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549 (11th Cir. 1986) (basis of motion argued as part of request for jury instruction); *Battle v. Mem. Hosp. at Gulfport*, 228 F.3d 544, 550 n.1 (5th Cir. 2000) (issue briefed in summary judgment motion); *Lewis v. Nelson*, 277 F.2d 207, 209 (8th Cir. 1960) (trial court understood that motion was directed to absence of evidence that defendant drove on wrong side of the road); *Railway Express Agency v. Epperson*, 240 F.2d 189, 193 (8th Cir. 1957) (50(a) motion sufficiently specific because "the trial judge knew what counsel was driving at;" motion denied on its merits).

[23] In *Motorola*, the defendant's motion stated: "'Your Honor, for the record, we do move for judgment as a matter of law in connection with the declaratory judgment claims filed by Motorola.'" *Id.* at 961. The trial judge rejected Motorola's argument that this motion was not sufficiently specific:

> The Court made clear that it *did not require or desire additional argument at the time the motion was made*, and it would be unfair to penalize [defendant] for acceding to the Court's wishes. The Court will rule on [defendant's Rule 50(b)] JMOL motion.

Id. (emphasis added). The grant of JMOL was affirmed on appeal. 121 F.3d at 1474.

terms. *See Anderson v. United Tel. Co. of Kansas*, 933 F.2d 1500, 1504 (10th Cir. 1991).

When ConAgra made its Rule 50(a) motion, everyone involved understood what ConAgra asserted as the fatal evidentiary defects in Unitherm's antitrust case. (J.A. 15a-16a, 22a, 139a-143a, 148a-152a; R. A2893.) ConAgra had briefed the absence of evidence of a properly defined relevant market and the absence of competition between the parties in its motion for summary judgment and in its pre-trial brief. (*Id.*) Nothing had changed. The trial judge's comments on the record showed that she understood the bases for ConAgra's motion and intentionally limited what she regarded as repetitious argument. On the first day of trial, the court indicated that argument on JMOL motions would be very restricted, if permitted at all, because "I can almost anticipate what your arguments are going to be at this point" (J A. 153a), and she indicated that she would only hear argument on motions she was inclined to grant. (*Id.*) When ConAgra moved for JMOL at the conclusion of Unitherm's case-in-chief, the court limited ConAgra to "five-minutes or less of argument" as to all causes of action. (J.A. 16a.) When ConAgra moved for JMOL at the close of all the evidence on "each of the three causes of action that the plaintiffs have brought," the district court once again cut argument short after confirming that the motion was "on the same basis [ConAgra] argued *earlier*[.]"[24] (J.A. 22a) (emphasis added). The trial court and Unitherm thus knew the bases of ConAgra's motion. ConAgra's motions, read in context of the entire record, fulfilled the purposes of Rule 50(a).

---

[24] This reference to earlier arguments had to be a reference to the pre-trial briefs and other written arguments, not the oral motions at the close of Unitherm's case-in-chief. *See supra* note 6.

IV. Since Unitherm Presented No Evidence Of Antitrust Liability, It Was Plain Error To Allow The Jury To Decide That Issue.

If the Court interprets Rule 50(b) to require a renewed motion to preserve sufficiency of the evidence for appeal, and applies that interpretation retroactively, then an important question remains: Should ConAgra prevail based on plain error? The Federal Circuit did not consider plain error because it reversed for insufficiency of the evidence. Therefore, if the Court does not rule for ConAgra on other grounds, it should either review for plain error or remand that issue to the Federal Circuit to consider in the first instance.

Even where a party has made *no* motion for JMOL, appellate courts review the record for plain error.[25] This Court's rules also permit plain error review. Sup. Ct. R. 24.1(a) ("At its option . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.") The district court committed plain error here.

A plain error is one so serious that failure to notice and correct it would work a manifest injustice.[26] In Rule 50

[25] *See, e.g., Biodex*, 946 F.2d at 854 ("When no motion challenging the legal sufficiency of the evidence has been made at any stage in the district court, the law is uniform in all circuits that review is limited to plain error.") (citations omitted); 9 *Moore's Federal Practice* § 50.91[3], § 50.92[3] (3d ed. 2005) (collecting cases). Unitherm asks the Court to hold that "[i]f the loser of a jury trial fails to file a Rule 50(b) motion, the appellate court should not attempt to review for sufficiency of the evidence." (Pet'r Br. 40.) This would overrule a long line of cases holding that plain error review is available where no Rule 50(a) motion has ever been made at trial.

[26] Courts often describe "manifest injustice" as meaning errors that "seriously affect the fairness, integrity, or public reputation judicial

(Continued on following page)

cases, courts find manifest injustice where there is no evidence to support a jury's verdict. *See, e.g., Russo v. New York*, 672 F.2d 1014, 1022 (2d Cir. 1982) (plaintiff's failure to prove element of claim is manifest injustice and hence plain error; "[w]here a jury's verdict is wholly without legal support, we will order a new trial in order to prevent manifest injustice. . . . ") (quoting *Sojak v. Hudson Waterways Corp.*, 590 F.2d 53, 54-55 (2d Cir. 1978)); *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996); *Zachar v. Lee*, 363 F.3d 70, 74 (1st Cir. 2004) (failure to comply with strictures of Rule 50 limits review to whether the record shows an "absolute dearth" of evidence to support the jury's verdict) (quoting *Davignon v. Clemmy*, 322 F.3d 1, 13 (1st Cir. 2003) and *Udemba v. Nicoli*, 237 F.3d 8, 13-14 (1st Cir. 2001)). As the Second Circuit pointed out in *Oliveras v. Am. Exp. Isbrandtsen Lines, Inc.*, 431 F.2d 814, 817 (2d Cir. 1970), "[t]o rule that an unintended flaw in procedure bars a deserving litigant from any relief is an unwarranted triumph of form over substance, the kind of triumph which . . . we strive now to avoid whenever possible."[27]

There was plain error here because there is *no* evidence to support Unitherm's antitrust claim. Moreover, the triumph of form over substance would be particularly acute because ConAgra raised the issue in the district court and complied with clear Tenth Circuit law to preserve it for appeal.

proceedings." *See, e.g., Glenn v. Cessna Aircraft Co.*, 32 F.3d 1462, 1464 (10th Cir. 1994). Here, the fairness of the proceedings below would be seriously impaired.

[27] *See also Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 187 (4th Cir. 1994); *Flintco*, 143 F.3d at 964.

Unitherm argues a different standard by citing authorities involving criminal cases, (*United States v. Olano*, 507 U.S. 725 (1993); *Johnson v. United States*, 520 U.S. 461 (1997); (Fed. R. Crim. P. 52(b)), failure to object to jury instructions (*Royal Maccabees Life Ins. Co. v. Choren*, 393 F.3d 1175, 1181 (10th Cir. 2005); Fed. R. Civ. P. 51(d)(2)), or failure to object to evidence introduced at trial (21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5043 (1977); Fed. R. Evid. 103(d)). (Pet'r Br. 30-32.) Those authorities from other contexts are inapplicable on their face, and in all of them *no objection at all* had been made before the case was submitted to the jury. As the First Circuit explained, a party who fails to object to a jury instruction should not be rewarded on appeal from an unfavorable verdict:

> [A] litigant who accedes to the form of a special interrogatory will not be heard to complain after the fact. . . . If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking.

Anderson v. Cryovac, Inc., 862 F.2d 910, 918 (1st Cir. 1988) (citations omitted). It is for this reason that "[t]he plain error standard, high in any event . . . is near its zenith in the Rule 51 milieu." *Toscano v. Chandris, S.A.*, 934 F.2d 383, 385 (1st Cir. 1991).

Similar reasoning applies where a party fails to raise evidentiary objections at trial. Thus, Unitherm cites *McEwen v. City of Norman*, 926 F.2d 1539, 1545 (10th Cir. 1991) to support its contention that plain error should be found only rarely. (Pet'r Br. 30.) But that case involved repeated failures to object to expert testimony that was arguably admissible and was subject to the trial court's

discretion in any event. *McEwen*, 926 F.2d at 1545-46. In such circumstances, and given the uncertain effect of an alleged error on a jury's deliberations,[28] appellate courts properly are reluctant to reverse for "plain" errors in evidentiary rulings. Like objections to jury instructions, objections to inadmissible evidence should be made at trial so the court can prevent error or caution the jury when it does, and to afford the party offering the evidence the opportunity to bolster its case by other means.

In contrast, ConAgra raised the issue no less than four times before the case went to the jury. (J.A. 15a-16a, 22a, 139a-143a, 148a-152a; R. A2893.) Where a party *has* moved at trial, and both the trial court and its opponent had notice of the evidentiary deficiencies complained of, and there was opportunity to correct the deficiencies or any error, there is little, if any, reason to withhold plain error review. A motion for JMOL *at the close of all evidence* serves Rule 50's aims to prevent "gambling on the verdict" and to eliminate unnecessary retrials.[29] ConAgra's Rule

---

[28] In *Olano*, which Unitherm also cites (Pet'r Br. 31), this Court held that allowing alternate jurors to attend deliberations was not plain error because the respondent did not show that the alternates participated in deliberations or had a chilling effect on the process. 507 U.S. at 739, 741. In contrast, allowing a verdict supported by no evidence to stand is plainly prejudicial.

[29] *See* Fed. R. Civ. P. 50(a) advisory committee note on 1991 amendment. ("The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment."); Memorandum from Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 109 (May 17, 2004, revised August 3, 2004) ("The earlier [Rule 50(a)] motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also

(Continued on following page)

50(a) motion thus served both fairness and judicial economy, and plain error review is fully warranted.

The Federal Circuit reviewed the evidence Unitherm offered on its antitrust claim and found it not just insufficient as a matter of law, but wholly lacking:

> Unitherm never presented *any evidence* that could possibly support critical factual elements of its claim. In particular, Unitherm failed to present *any facts* that could allow a reasonable jury to accept either its proposed market definition or its demonstration of antitrust injury . . . .

(Pet'r App. 2a) (emphasis added). Therefore, "[t]he district court erred . . . in allowing the jury to decide Unitherm's antitrust claims despite the *total absence of economic evidence* capable of sustaining those claims." (*Id.*) (emphasis added).[30]

In the absence of *any* evidence to show a relevant antitrust market or antitrust injury, it was plain error and manifestly unjust to allow Unitherm an $18,000,000 windfall for antitrust injury it never proved.[31] *See Oliveras*, 431 F.2d at 817; *Russo*, 672 F.2d at 1022. As the Federal Circuit put it, "if . . . Unitherm provided economic evidence insufficient to convince any reasonable jury that ConAgra's enforcement of the '027 Patent harmed a relevant antitrust market, the antitrust claims should never have reached the jury." (Pet'r App. 46a.)

Unitherm tries to avoid the plain error rule by arguing that sufficient evidence supported its antitrust claim. (Pet'r Br. 33-38.) This flies in the face of the Federal Circuit's analysis and findings. The court found that Unitherm failed to produce *any* evidence that could support three of the essential elements of antitrust liability for attempt to monopolize, namely, proof of a relevant geographic and product market, proof of a dangerous probability of success in monopolizing the relevant market, and proof that the attempt to monopolize injured Unitherm. (Pet'r App. 45a, 49a.) It noted that instead of producing economic evidence defining a relevant market, Unitherm's expert erroneously defined the market in terms of technological substitutability, not economic substitutability, and took the untenable position that it was coterminous with the '027 Patent. (*Id.* at 46a-47a.)[32]

---

alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury."); *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986), *cert. denied*, 479 U.S. 848 ("[T]he motion for directed verdict at the close of all the evidence provides the nonmovant an opportunity to do what he can to remedy the deficiencies in his case.").

[30] It is therefore untrue that the Federal Circuit's review of the evidence for antitrust liability "was not moored to any ruling admitting or excluding evidence or any grant or denial of a jury instruction, or to any ruling whatever made by the trial court." (Pet'r Br. 33, 36.) It was "moored to" the trial court's denial of ConAgra's timely motion for JMOL. Moreover, plain error review is proper even where *no* motion for JMOL has been made. *See, e.g., Biodex*, 946 F.2d at 854; Sup. Ct. R. 24.1(a).

[31] Unitherm claims that "[o]ne can hardly find manifest injustice where ConAgra intentionally defrauded a federal agency, the United States Patent Office, to obtain the '027 Patent." (Pet'r Br. 33.) But fraud on the Patent Office is just the threshold requirement of a *Walker Process* claim. One can and should find manifest injustice where a plaintiff offers no evidence to support its claim, but nevertheless obtains a jury verdict for millions of dollars.

[32] Unitherm says the technology substitution point was "uttered for the first time [by the judge] at oral argument [on appeal]." (Pet'r Br. 9, n.11.) This is misleading. The point did not raise a new issue on appeal,

(Continued on following page)

The Federal Circuit also noted that the expert "testified that he was unaware of anyone who had ever sold the process that defined his relevant market – other than tied to the sale of an oven," and "steadfastly refused to clarify the relationship among the market for the specific browning process that he had identified, the market for browning processes generally, and the market for ovens that enabled their owners to use either the specified browning process or browning processes more generally." (*Id.* at 48a.) He also "testified to a lack of knowledge as to whether or not the bundling of the identified process with an oven bore any relation to the prices charged for enabling ovens." (*Id.*) Thus, Unitherm's expert could not identify *any* transaction in the claimed relevant market.

The Federal Circuit also pointed out Unitherm's failure to show causation, "a critical element needed to show antitrust injury. . . . " (*Id.* at 49a.) Its damages experts never "differentiate[d] harm attributable to ConAgra's [alleged] *antitrust* liability from harm attributable to other allegations for which ConAgra might be liable." (*Id.*) Nor did either expert "try to differentiate between ConAgra's liability and other potential causes of the [claimed] losses. . . . " (*Id.*) The Federal Circuit summarized and concluded:

> In short, Unitherm failed to present *any* economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its Section 2 claim. Unitherm has presented conclusory testimony from its expert that defines the market as coterminous with the patent based entirely on issues of *technical* [not economic] substitutability, described no market analysis, inferred market power from the possession of a patent, tautologically equated unsuccessful attempts at collecting royalties with a dangerous probability of success, and inferred antitrust injury from economic loss. ConAgra is correct in asserting that Unitherm failed to provide *any* evidence capable of sustaining the jury's finding of antitrust liability.

(Pet'r App. 50a) (emphasis added).

That analysis describes plain error in the Rule 50 context.[33] Although this Court may notice and correct plain error, at a minimum, the case should be remanded to the Federal Circuit to perform a plain error review should the Court rule against ConAgra on Rule 50(b) and retroactivity.

CONCLUSION

Judgment should be entered for ConAgra on the antitrust claim and the case should be remanded for entry of judgment against ConAgra only on the intentional interference cause of action at most. If the Court adopts Unitherm's proposed interpretation of Rule 50(b), the

---

but simply explained *why* Unitherm's evidence was insufficient. (Pet'r App. 48a.) No rule forbids a court from explaining its holding.

[33] *See* discussion *supra* at p. 43. Indeed, there is plain error even under the analysis applied in cases like *Olano*, 507 U.S. at 725 and *Johnson*, 520 U.S. at 461. The applicable antitrust law is clear and well-established, yet the trial court allowed Unitherm to prevail with *no* evidence of a relevant market, of a dangerous likelihood of monopolization of the purported market, or of causation. Thus the errors were clear. The damage award of $18,000,000 in trebled damages is prejudicial and affects substantial rights, and allowing the award to stand would be a manifest injustice, especially where the defects in proof were repeatedly brought to the trial court's attention.

Court should either apply the new rule prospectively, or conduct plain error review. In either case, the Court should remand to district court.

Respectfully submitted,

JOHN P. PASSARELLI
DAVID H. ROE
MCGRATH NORTH MULLIN
& KRATZ PC LLO
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070

ROBERT A. SCHROEDER
Counsel of Record
JOHN R. REESE
LEIGH OTSUKA CURRAN
ROBERT C. HORTON
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue,
Suite 4400
Los Angeles, California 90071
(213) 680-6400

Supreme Court, U.S.
FILED
AUG 18 2005
OFFICE OF THE CLERK

No. 04-597

IN THE

Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT ECKRICH, INC.
d/b/a CONAGRA REFRIGERATED FOODS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

BURCK BAILEY
Counsel of Record
GREG A. CASTRO
JAY P. WALTERS
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
100 North Broadway
Suite 1700
Oklahoma City, OK 73012-8820
(405) 232-0621

DENNIS D. BROWN
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
321 South Boston
Suite 800
Tulsa, OK 74103-3318
(918) 599-0621

Attorneys for Petitioner

195937

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page ii of Petitioner's Opening Brief, and there are no amendments to that Statement.

TABLE OF CONTENTS

	Page
Statement Pursuant To Rule 29.6	i
Table Of Contents	ii
Table Of Cited Authorities	iv
Argument	1
I. ConAgra's Arguments Are Largely Irrelevant To The Question On Certiorari.	1
II. ConAgra's Argument That The Trial Court, And Unitherm, Should Have Divined What ConAgra Allegedly Intended, Because Of A Motion For Summary Judgment And Trial Brief, Is Meritless.	4
III. The Deadline For Submitting A Rule 50(b) Motion Is 10 Days After Entry Of Judgment, Not After Merely Receiving A Verdict.	9
IV. The Trial Court Did Not, And Could Not, Commit Error By Denying ConAgra's Pre-Verdict Motion For JMOL, And Therefore There Can Be No Plain Error.	12
V. ConAgra Seeks To Have This Court Set Aside Long-Established Precedent.	13
VI. The Court Should Apply Its Interpretation Of Rule 50(b) To This Case.	14

Contents

	Page
VII. An Appellate Court Should Not Review For Sufficiency Of The Evidence In The First Instance Because It Is Too Far Removed From The Trial.	16
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

CASES:

Berry v. United States, 312 U.S. 450 (1941) 19

Biodex Corp v. Loredan Biomedical, Inc., 946 F.2d 850 (Fed. Cir. 1991) 9, 19

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 14, 15

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 7, 13, 20

Duro-Last, Inc. v. Custom Seal, Inc., 321 F.3d 1098 (Fed. Cir. 2003) 8

First Safe Deposit Nat'l Bank v. Western Union Tel. Co., 337 F.2d 743 (1st Cir. 1964) 9, 10

Glaros v. H.H. Robertson Co., 797 F.2d 1564 (Fed. Cir.), *cert. dismissed*, 479 U.S. 1072 (1987) 6

Harper v. Virginia Dep't. of Taxation, 509 U.S. 86 (1993) 14, 15

James B. Beam Distilling Co. v. Georgia., 501 U.S. 529 (1991) 15

Johnson v. New York, New Haven & Hartford R.R. Co., 344 U.S. 48 (1952) ..... *passim*

Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) ... 15

Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221 (10th Cir. 1999) 15

Page

Mosser v. Fruehauf Corp., 940 F.2d 77 (4th Cir. 1991) 9, 10

Myers v. Mo. Pac. R.R. Co., 52 P.3d 1014 (Okla. 2002) 6

Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967) 12

Nichols Constr. Corp. v. Cessna Aircraft Co., 808 F.2d 340 (5th Cir. 1985) 9, 10

Norton v. Snapper Power Equip., 806 F.2d 1545 (11th Cir. 1987) 9, 10

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 14, 15

Robinson v. Neil, 409 U.S. 505 (1973) 14

Ryder v. United States, 515 U.S. 177 (1995) 14

Shaw v. Edward Hines Lumber Co., 249 F.2d 434 (7th Cir. 1957) 9, 10

Switzerland Cheese Ass'n. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) 5

Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139 (D.C. Cir. 2004) 3

Townsend v. Daniel, Mann, Johnson & Mendenhall, 196 F.3d 1140 (10th Cir. 1999) 4

Page

Varda, Inc. v. Ins. Co. of N. Am., 45 F.3d 634 (2d Cir. 1995) 6

Warkentien v. Vondracek, 633 F.2d 1 (6th Cir. 1980) 9

Whalen v. Unit Rig, Inc., 974 F. 2d 1248 (10th Cir. 1992) 5-6

STATUTES:

28 U.S.C. § 2071 *et seq.* 16

RULES:

Fed. R. App. P. 4(a)(4) 11

Fed. R. Civ. P. 5 11

Fed. R. Civ. P. 6(a) 11

Fed. R. Civ. P. 7(b)(1) 11

Fed. R. Civ. P. 50 .....3, 4, 7, 11

Fed. R. Civ. P. 50(a) 3, 4, 10

Fed. R. Civ. P. 50(a)(1) 8

Fed. R. Civ. P. 50(a)(2) 9, 11

Fed. R. Civ. P. 50(b) ..... *passim*

Fed. R. Civ. P. 59 12

Page

OTHER AUTHORITIES:

9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE, § 50.41 (3d ed. 2005) 14

ARGUMENT

I. ConAgra's Arguments Are Largely Irrelevant To The Question On Certiorari.

Much of ConAgra's repetitious Response Brief is not pertinent to the question on certiorari. ConAgra's Response Brief contains the same spin on the facts as its previous appellate papers, but side-steps the hard realities posed by the question at issue. There is no antitrust standing or antitrust injury issue here.[1] The trial court and the Federal Circuit concluded that the Unitherm Process and the patented process are one and the same. (Pet. App. 20a). "In short, Unitherm's undisputed evidence proved that its own process included each and every limitation of every claim of the '027 Patent." (Pet. App. 25a-26a). Unitherm and ConAgra were undisputedly direct competitors for sale of the process.[2] Furthermore, this Court denied ConAgra's Conditional Cross-Petition for a Writ of Certiorari regarding antitrust standing. 125 S. Ct. 1399 (2005).

ConAgra's Response Brief seeks to re-try the case the jury decided against it. ConAgra continues to quote selectively, and out of context, Dr. Mangum's testimony describing the relevant market. (Br. for Resp't p. 6). Unitherm long ago showed this to

---

[1] ConAgra's Answer (Docket No.9) and Amended Answer did not contain any reference to Unitherm having a lack of standing or antitrust injury, as affirmative defenses. (R. A0268-0286). In the final Pretrial Order, ConAgra did not contend that Unitherm lacked standing or had not suffered antitrust injury. (R. A2886-2893). In its trial brief, ConAgra never mentioned that Unitherm lacked standing or antitrust injury. (R. A3092-3096).

[2] ConAgra's expert, Dr. Goedde, testified:

> Q. . . . So what is being licensed here, as I think we've made I hope clear by now, is nothing but the process that Unitherm was selling and that ConAgra was selling; right?
>
> A. Yes.

(R. A5844).

be misleading. (Br. for Pls./Appellees to Fed. Cir. pp. 34-36). ConAgra continues to suggest that the claimed color "golden brown" should have exempted it from the fraud it perpetrated on the Patent Office. (Br. for Resp't pp. 1, 4-6 n.5).[3] Similarly, ConAgra's discussion of its irrelevant post-trial motion for remittitur has nothing to do with the question on certiorari.[4]

The essence of ConAgra's argument is to blame the trial court instead of recognizing that it is counsel's job to follow the rules. The fact that ConAgra never made any motion for judgment as a matter of law at trial on any of the factual issues

[3] ConAgra's "defense" to fraudulently obtaining a patent on the Unitherm Process was to concoct a special definition for the claim term "golden brown" by combining Hunter-LAB meter readings from the patent examples and then adding them to the patent claims. ConAgra contended that this special definition of "golden brown" is so narrow and precise that photographs cannot capture it and the human mind is incapable of remembering or even recognizing it. (*See* Confidential Br. of Appellant, Swift-Eckrich to Fed. Cir. pp.12, 31-32). The district court, the jury, and the Federal Circuit all concluded that ConAgra's redefinition of "golden brown" was meritless.

Further, ConAgra's assertions (Br. for Resp't p. 10) that the Unitherm Process is nothing more than the inferior "conventional" process mentioned in the patent and that the Unitherm/patented process differs from the conventional process only with regard to the production of better color are equally meritless. (*See* Br. for Pls-Appellees Unitherm and Jennie-O to Fed. Cir. pp. 3-11, 14-21, 40-42, 44-45, and 54-57; Resp. of Pls-Appellees Jennie-O and Unitherm to Def.-Appellant's Combined Pet. for Panel Reh'g and Suggestion for Reh'g En Banc pp. 2-15).

[4] ConAgra misleadingly describes this as "E. ConAgra's Post-Trial Motion For A New Trial." (Br. for Resp't p. 11). ConAgra's Motion was entitled: "Defendant Swift-Eckrich's Motion for Remittitur Reducing Damage Award on Antitrust Count, or, in the Alternative, for New Trial on Antitrust Damages." (J.A. 34a). In ConAgra's Brief, this becomes inverted as ". . . ConAgra *did* move for a new trial under Rule 59, or in the alternative for a remittitur." (Br. for Resp't p. 11; emphasis in original).

it raised for the first time on appeal is made manifest in its footnote 6. In reference to ConAgra's motion for directed verdict at the close of all the evidence when the trial court asked, "Is it on the same basis *you argued earlier*?" (J.A. 22a; emphasis added), ConAgra states in footnote 6 that,

> Since the court had not allowed enough time for *any argument* on the antitrust and intentional interference claims during the trial, this had to be a reference to the pre-trial brief and other pre-trial papers, not the argument of ConAgra's motions at the close of Unitherm's case in chief.

(Br. for Resp't p. 10; emphasis added).

This statement is remarkable for more than one reason. ConAgra solemnly contends that the trial court did not mean the five pages of argument it listened to when ConAgra made its earlier motion for directed verdict at the close of Unitherm's case, but rather the papers ConAgra had filed before the trial began. This contention is utterly preposterous. Further, it is a stark concession of what the record so clearly reveals - that ConAgra never made any Rule 50(a) argument on Unitherm's antitrust claim.[5]

With regard to ConAgra's contention that the trial court "had not allowed enough time for any argument", the record shows that the trial court allowed ConAgra's counsel to argue at length in making his motion for directed verdict at the close of Unitherm's case, and in no way prevented counsel from urging

[5] While the question on certiorari assumes that a Rule 50(a) motion was made, the obvious absence of such a motion is somewhat akin to ignoring the elephant in the room.

A cardinal principle of Rule 50 is to give the non-moving party an opportunity to cure any perceived evidentiary defect. "Relatedly, a party who has rested may move to reopen her case in order to cure an evidentiary deficiency identified in a Rule 50(a) motion." *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 1149 (D.C. Cir. 2004).

any argument he wanted to make. (J.A. 15a-22a).[6] If, when Unitherm rested its case, ConAgra truly thought Unitherm's proof on its antitrust claim was so wanting in evidence as to be "plain error" ConAgra would have said so. In truth, ConAgra did not think Unitherm's antitrust evidence was insufficient. ConAgra did not decide to make that argument until it arrived at the Federal Circuit, thereby severely prejudicing Unitherm's ability to address the arguments. As has been shown in Unitherm's previous appellate papers,[7] and as will be further shown below (Part VII), as a result of not having the entire record before it, the Federal Circuit's foray through the truncated Joint Appendix led it into grave factual errors.

II. ConAgra's Argument That The Trial Court, And Unitherm, Should Have Divined What ConAgra Allegedly Intended, Because Of A Motion For Summary Judgment And Trial Brief, Is Meritless.

ConAgra's argument that it should be absolved from compliance with Rule 50 because of the "futility" of making such a motion, amounts to this: the points were urged in a motion for summary judgment and a trial brief so the trial court should have known what ConAgra meant to say, even though ConAgra never uttered a word about such insufficient evidence at trial or post-judgment. ConAgra's argument cannot survive even

[6] It is quite misleading, and unfair to the trial court, for ConAgra to state: "The court then allowed 'five minutes or less' for argument. . . ." (Br. for Resp't p. 9). A cursory review of the record shows that ConAgra argued at length with no limitation by the court. (J.A. 15a-22a).

Furthermore, if counsel thinks the trial court is not allowing adequate time for argument on his pre-verdict Rule 50(a) motion, the law in the Tenth Circuit requires that he make an objection to that effect. *Townsend v. Daniel, Mann, Johnson & Mendenhall*, 196 F.3d 1140, 1148 (10th Cir. 1999).

[7] *See* Combined Pet. for Panel Reh'g and Reh'g En Banc, submitted by Pls-Appellees pp. 9, *et seq.* (J.A._121a); Br. for Pet'r pp. 34-38.

minimal scrutiny. In the first place, the only argument in ConAgra's Motion for Summary Judgment directed to Unitherm's antitrust claim was that "Unitherm cannot succeed on its antitrust claims against Swift-Eckrich because it is not a competitor of Swift-Eckrich." (R. A0248). In short, ConAgra made a standing argument. There was no hint of an insufficiency of evidence argument. ConAgra's Summary Judgment Reply Brief complained that Unitherm had improperly redefined the relevant market. (Docket No. 172, Def's Reply Br. Mot. for Summ. J. pp. 1-3). The insufficiency arguments made by ConAgra in the Federal Circuit are simply absent from its Motion for Summary Judgment.

Furthermore, ConAgra's Motion for Summary Judgment was filed more than a year before the trial, and the trial court entered its Order ruling on the Motion more than half a year before trial.[8] Even if ConAgra had raised the insufficiency arguments in its summary judgment motion that it first raised on appeal, it defies belief to think a busy trial court could remember such details many months later. Also, numerous depositions were taken after ConAgra's Motion for Summary Judgment was ruled on.[9] And there were eight days of trial generating over 1,500 pages of transcript as well as numerous and voluminous exhibits introduced into evidence. In addition, it has long been settled that denial of summary judgment is not reviewable on appeal. "It is strictly a pretrial order that decides only one thing - that the case should go to trial." *Switzerland Cheese Ass'n. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *see also Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th

[8] Docket No. 117 (Mot. for Summ. J. by Def. Swift-Eckrich, Inc., filed February 11, 2002); Docket No. 194 (Order, filed August 19, 2002); Docket No. 277 (Court Minute, Jury trial commences March 10, 2003).

[9] Docket No. 197 (Joint Discovery Plan, filed August 30, 2002, listing depositions yet to be taken).

Cir. 1992); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 and n.14 (Fed. Cir.), *cert. dismissed*, 479 U.S. 1072 (1987).[10]

Presumably it is merely carelessness that caused ConAgra to repeat in its Response Brief the same misrepresentation it made to the Federal Circuit in its Reply Brief (when Unitherm had no opportunity to respond) that, "**On the first day of trial**, the court indicated that argument on JMOL motions would be very restricted. . . ." (Br. for Resp't p. 41; emphasis added).[11] But in fact, the statement by the trial court to which ConAgra refers occurred at the close of the trial day on Friday, March 14, 2003. (Tr. 925; R. A4699-4700). The trial began on Monday, March 10. (Tr. 3). The trial court had heard five days of testimony from over a dozen witnesses and received into evidence more than 100 exhibits.[12] The trial court's statement that, "I'll certainly allow everybody to argue if I think you're going to prevail, and I can almost anticipate what your arguments are going to be at this point" (R. A4700), indicates an openness to any argument based on the evidence, rather than the reverse as ConAgra suggests.[13] Twisting the facts does not change the truth: ConAgra

[10] In *Myers v. Mo. Pac. R.R. Co.*, 52 P.3d 1014, 1034 (Okla. 2002), the Oklahoma Supreme Court stated:

> Furthermore, it would be anachronistic after a case has been tried on the merits to review that case on pretrial submissions alone rather than upon the evidence and record as a whole. . . . At least ten Federal Circuit courts have held that the denial of a summary judgment motion is not reviewable on appeal.

[11] *See* Reply Br. of Appellant to Fed. Cir. p. 26.

[12] Docket No. 287 (Courtroom minutes . . . master exhibit list attached).

[13] In *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634 (2d Cir. 1995), defendant contended that pre-verdict rulings and comments by the trial court excused defendant's failure to file a Rule 50(b) motion. The Second (Cont'd)

never made a proper Rule 50 motion at any stage of the proceedings.

Even weaker than its contention that the trial court had some mental telepathy about the summary judgment motion, is ConAgra's argument that its trial brief satisfied Rule 50. Both Unitherm and ConAgra filed trial briefs on March 3, 2003, the Monday before trial began.[14] At the time the trial briefs were filed, the trial court was confronted with numerous pending motions in limine.[15] The trial court did not get all its written rulings on the motions in limine filed until the third day of trial.[16] The record is silent as to whether the trial court ever had time to review any party's trial brief, but for sure a trial brief does not invoke a ruling by the trial court. ConAgra never made reference to the brief during argument or post-verdict. What ConAgra might have secretly intended cannot avail it here.[17] Even if the

(Cont'd)
Circuit held that the failure to file a Rule 50(b) motion was fatal to an appeal claiming insufficiency of the evidence:

> To preserve for appeal a challenge to the denial of a pre-verdict motion for judgment as a matter of law, a movant must renew that motion after the verdict. Fed.R.Civ.P. 50(b); *see Johnson v. New York, New Haven & Hartford R.R.*, 344 U.S. 48, 50 (1952); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 214-18 (1947).

Id. at 638.

[14] Docket Nos. 263 and 267.

[15] Docket Nos. 242, 243, 244, 245, 246, 247, 255, 257, 272, 273, 274.

[16] Docket Nos. 276 (March 10, 2003), 279 (March 12, 2003), 280 (March 12, 2003).

[17] Regarding respondent's unspoken intentions in *Johnson v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 48, 51 (1952), this Court stated:

(Cont'd)

trial court had reviewed ConAgra's trial brief, ConAgra's failure to allude to its contents at trial or post-verdict would logically lead the trial court to assume ConAgra had abandoned any such arguments in the face of the evidence at trial. Further, the proposition urged by ConAgra that a Rule 50 motion is not required at trial if issues have been discussed in pre-trial memoranda, cannot be squared with the language of Rule 50(a)(1) that: "If *during a trial by jury* a party has been fully heard on an issue. . . ."

There is another glaring inconsistency in ConAgra's argument: by failing to file a renewed motion for JMOL under Rule 50(b), ConAgra was foregoing entitlement to *judgment* under controlling Supreme Court precedent *in every circuit* including the Tenth Circuit. ConAgra could never get the relief it sought in the Federal Circuit - judgment in its favor - only the relief it did not seek - a new trial on Unitherm's antitrust claim. This turns the outcome on its head, because ConAgra did not want a new trial on the merits, it wanted *judgment*. In short, ConAgra's pretense of relying on Tenth Circuit law in failing to file a post-judgment motion for JMOL is belied by the relief it sought in the Federal Circuit - *i.e.*, judgment, not a new trial.[18]

(Cont'd)

> The defect in this argument is that respondent's motions cannot be measured by its unexpressed intention or wants. . . . And surely petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to fathom the unspoken hopes of respondent's counsel.

[18] Of course, any effort by ConAgra to assert post-judgment arguments it did not urge in its pre-verdict motion would have been impermissible. As the Federal Circuit stated in *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1107 (Fed. Cir. 2003): "In view of a litigant's Seventh Amendment rights, it would be constitutionally impermissible for the district court to re-examine the jury's verdict and to enter JMOL on grounds not raised in the pre-verdict JMOL."

III. The Deadline For Submitting A Rule 50(b) Motion Is 10 Days After Entry Of Judgment, Not After Merely Receiving A Verdict.

ConAgra attempts to muddy the water by citing cases holding "that the district court can grant a Rule 50(a)(2) motion *post-verdict* without a renewal under Rule 50(b)." (Br. for Resp't p. 22 and n.14; emphasis in brief). The district court can do this. But the cases ConAgra cites are not pertinent to the issue at hand. In each of the cases cited by ConAgra *no judgment had been entered*.[19] Rule 50(b) sets a *deadline* for renewing a motion for JMOL "no later than 10 days after entry of judgment." The movant does not *have* to wait until entry of judgment to renew his motion for JMOL. He can renew it immediately after the jury returns its verdict. If he does so, the trial court can rule on it immediately or set it for hearing. Similarly, if the trial court rules on a reserved motion for JMOL made pre-verdict following the jury verdict but before judgment is entered, its ruling is effectively a Rule 50(b) ruling. In *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850 (Fed. Cir. 1991), the Federal Circuit noted (in *dicta*) that if the trial court ruled post-verdict on a deferred pre-verdict motion, it "effectively converts the motion into a post-verdict motion." *Id.* at 861.

In *Warkentien v. Vondracek*, 633 F.2d 1 (6th Cir. 1980), the defendant moved for directed verdict at the conclusion of the evidence and the trial court reserved decision on the motion. The jury returned a verdict in favor of plaintiff, and defendant orally renewed its motion when the jury was dismissed. The trial court set the reserved motion for hearing and briefing. Following the hearing, the trial court granted the renewed

---

[19] *Norton v. Snapper Power Equip.*, 806 F.2d 1545 (11th Cir. 1987); *Shaw v. Edward Hines Lumber Co.*, 249 F.2d 434 (7th Cir. 1957); *First Safe Deposit Nat'l Bank v. Western Union Tel. Co.*, 337 F.2d 743 (1st Cir. 1964); *Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340 (5th Cir. 1985); *Mosser v. Fruehauf Corp.*, 940 F.2d 77 (4th Cir. 1991). (Br. for Resp't p. 22 n.14).

motion. Praising the quality of the trial court's opinion ruling on the motion,[20] the Sixth Circuit affirmed, concluding that *Johnson's* requirement for a renewed motion under Rule 50(b) was satisfied by defendant's oral renewal of the motion after the jury was dismissed.

If, as in each of the cases cited by ConAgra, the district court grants a reserved Rule 50(a) motion when the jury returns its verdict but before entry of judgment, it has acted in accordance with its power.[21] But if the trial court *denies* a reserved motion after verdict but before judgment is entered, the movant must renew the motion per Rule 50(b). Once *judgment* is entered - the district court having denied the Rule 50(a) motion pre-verdict or post-verdict, or having declined to rule on a reserved motion before entry of judgment - the *only*

---

[20] "Judge Miles' effort is a superlative example of such an opinion, and we have borrowed heavily from it in portions of this opinion." *Id.* at 2 n.2.

[21] In the cases of *Norton*, *Shaw*, *First Safe*, *Nichols*, and *Mosser*, each trial court ruled on the reserved 50(a) motion either immediately or very shortly after the jury returned a verdict for plaintiff. This practice appears to be in harmony with the recommendation by the 1991 Advisory Committee Notes (Subdivision (b), second paragraph):

> Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because the jury verdict for the moving party moots the issue and because a pre-verdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.

way the verdict loser can preserve sufficiency of the evidence for appellate review is to file a Rule 50(b) motion.[22]

This construction harmonizes with the language of Rule 50 and with the application of other pertinent Rules. A Rule 50(a)(2) motion "may be *made* at any time before submission of the case to the jury." Under Rule 50(b), the motion is renewed "by *filing* a motion no later than 10 days after entry of judgment." Federal Rule of Civil Procedure 7(b)(1) requires that a motion be *in writing* "unless made during a hearing or trial." When judgment is entered, the trial is over. A Rule 50(b) motion must be in writing, filed and served. The Advisory Committee Notes to the 1991 Amendments state (last paragraph of subdivision (b)):

> [Rule 50(b)] retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment. The renewed motion *must be served and filed* as provided by Rule 5. A purpose of this requirement is to meet the requirements of F.R.App. P. 4(a)(4).[23]

(Emphasis added).

---

[22] Here, the jury verdict was filed March 19, 2003. (J.A. 23a-26a). The judgment was filed eight days later, on March 27, 2003. (J.A. 27a-30a). The Advisory Committee Notes to the 1995 Amendments provide:

> The phrase 'no later than' is used - rather than 'within' - to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

[23] Federal Rule of Appellate Procedure 4(a)(4) provides in pertinent part:

(Cont'd)

IV. The Trial Court Did Not, And Could Not, Commit Error By Denying ConAgra's Pre-Verdict Motion For JMOL, And Therefore There Can Be No Plain Error.

As Unitherm discussed in its Brief for Petitioner (pp. 25-26, and *see* n.21, *supra*), it has long been recognized that trial courts are encouraged to submit the case to the jury even if the judge believes the evidence to be insufficient. That being so, a trial court's denial of a pre-verdict motion for JMOL cannot be error.[24] And as stated in *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967):

> Under Rule 50(b), if a party moves for a directed verdict at the close of the evidence and if the trial judge elects to send the case to the jury, the judge is 'deemed' to have reserved decision on the motion.

Therefore, as a matter of law, the trial court makes its pre-verdict ruling subject "to the court's later deciding the legal questions raised by the motion." Thus, the trial court's pre-verdict ruling is interlocutory and cannot be error. It follows that if the pre-verdict ruling cannot be error, it assuredly cannot be *plain* error. The only way the movant can preserve the issue of sufficiency

---

(Cont'd)

> If a party timely *files* in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> (i) for judgment under Rule 50(b);
>
> . . . .
>
> (v) for a new trial under Rule 59;
>
> . . . .

(Emphasis added).

[24] The Court stated in *Johnson*: "The rule itself made the reservation automatic." 344 U.S. at 53.

of the evidence for appellate review is by filing a Rule 50(b) motion no later than 10 days after entry of judgment.

V. ConAgra Seeks To Have This Court Set Aside Long-Established Precedent.

The requirement for filing a Rule 50(b) motion to preserve sufficiency of the evidence for appellate review was summarized by this Court in *Johnson*:

> This *requirement* of a timely application for judgment after a verdict is not an idle motion. . . . The *requirement* for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. . . . Rule 50(b) as written and as construed by us is not difficult to understand or to observe.

344 U.S. at 53 (emphasis added).

This Court's language in *Johnson* was essentially a reiteration of its language in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947):

> Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. [Citations omitted.] Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone.

As Unitherm has previously pointed out, *Johnson* and *Cone* do not expressly govern the issue at hand because in those cases the respondent filed a motion for new trial or to set aside the verdict, while no such motion was filed herein. Nevertheless, it

is not possible to reconcile the foregoing language in *Johnson* and *Cone* with ConAgra's argument that no post-judgment Rule 50(b) motion need be filed to preserve sufficiency of the evidence for appellate review.[25] Thus, what ConAgra seeks, albeit indirectly, is the overruling of long-standing precedent. Such a reversal would open the door to confusion and the balkanization of the controlling law nationwide. This should not happen.

VI. The Court Should Apply Its Interpretation Of Rule 50(b) To This Case.

While ConAgra tips its hat to this Court's most recent pronouncement of its retroactivity jurisprudence in *Harper v. Virginia Dep't. of Taxation*, 509 U.S. 86 (1993), ConAgra then goes on to conduct its own analysis loosely attempting to follow *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[26] "But whatever the continuing validity of *Chevron Oil* after *Harper* . . . and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995)," this is not a case for purely prospective application of a "new rule." *See Ryder v. United States*, 515 U.S. 177, 184-185 (1995).

As this Court found in *Harper*:

> "[B]oth the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Robinson v. Neil*, 409 U.S. 505, 507 (1973). Nothing in the Constitution alters the fundamental rule of

[25] "As a practical matter, moving parties must renew the motion for judgment post-verdict to preserve the right to full appellate review of the trial court's denial of a pre-verdict motion for judgment (*see* § 50.91[1])." 9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE, § 50.41 (3d ed. 2005).

[26] ConAgra's footnote 21 incorrectly states that there were five opinions in *Harper*. There were four. Also, only five justices joined Part II of the majority's opinion, not eight. Seven justices concurred in the judgment and Parts I and III of the majority opinion.

> "retrospective operation" that has governed "[j]udicial decisions . . . for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910) (Holmes, J., dissenting).

509 U.S. at 94. The Court further stated:

> Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that "the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case" and that the federal law applicable to a particular case does not turn on "whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application" of a new one. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (opinion of Souter, J.).

Id. at 95 n. 9. The Court in *Harper* was addressing the viability of "selective prospectivity," but these statements by the majority of the Court are inconsistent with ConAgra's plea for pure prospective application in this case.

Even under a *Chevron Oil* analysis ConAgra's arguments fail, because a decision in Unitherm's favor would not "overrul[e] clear past precedent on which litigants may have relied" or "decid[e] an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106-07. As Unitherm has previously shown, the outcome of this case should be governed by existing Supreme Court authority. In addition, the Tenth Circuit had already identified a split in the circuits on this issue. *See Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1246-47 n.34 (10th Cir. 1999); *see also Reynoldsville Casket Co.*, 514 U.S. at 763 (opinion of Kennedy, J., concurring in judgment); *Harper*, 509 U.S. at 110-112 (opinion of Kennedy, J., concurring in judgment). Given this Court's precedents and the clear circuit split, a decision of this Court affirming the majority of circuit

courts has been "clearly foreshadowed." If ConAgra's view is adopted, no resolution of a circuit split in a civil case could ever be applied retroactively.[27]

VII. An Appellate Court Should Not Review For Sufficiency Of The Evidence In The First Instance Because It Is Too Far Removed From The Trial.

It is difficult for an appellate court, far removed in place and time, to know what actually went on at trial. It shows respect to trial courts for appellate courts to require that they be accorded the opportunity in the first instance to speak to the issue of sufficiency of the evidence.

This case compellingly demonstrates the critical importance of requiring that the trial court pass in the first instance on a post-judgment motion for JMOL asserting insufficiency of the evidence. Without having the entire record in front of it for review, the Federal Circuit conjured up perceived evidentiary deficiencies that did not exist. ConAgra had not raised the issues at trial or post-verdict, so the evidence of record was not contained in the Joint Appendix filed in the Federal Circuit. For example, in discussing the important "first element" of Unitherm's *Walker Process* claim, the Federal Circuit incorrectly stated:

> Though the plaintiffs' [sic] have provided no direct evidence proving that either Singh or ConAgra actually made this representation [*i.e.*,that Prem Singh invented the claimed process], we may nevertheless presume that Singh, the named inventor and applicant, must have reviewed the specification

[27] The Court should reject ConAgra's suggestion that it act in a more "legislative" posture because the case involves a Federal Rule. As this Court is well aware, its role in promulgating the Federal Rules is spelled out clearly by the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, wherein Congress specifically reserved a role for itself.

> and signed the required declaration before the application was filed.

(Pet. App. 35a).[28] In fact, Prem Singh's signed Declaration of Inventorship was introduced into evidence by Unitherm *through its very first witness.*[29] (Plaintiffs' Exhibit 2, pp. 2, 3; Tr. 98-102). The Federal Circuit went on to "review the sufficiency of the economic evidence that Unitherm proffered in support of its antitrust claim." (Pet. App. 46a). The Federal Circuit concluded, quite incorrectly, that:

> Nothing in the record addresses whether potential customers of the patented process faced with a price increase would shift to other processes offering different combinations of benefits. *Id.* [sic]. This determination, however, lies at the heart of market definition in antitrust analysis.

[28] In its footnote 6, the Federal Circuit erroneously stated that because of perceived deficiencies in the evidence, "the plaintiffs must build an entirely circumstantial case using inferences and presumptions." (Pet. App. 35a, n. 6).

[29] Unitherm's first witness, Charles Van Horn, a lawyer in Washington, D.C., spent thirty years in the United States PTO, concluding his service as Deputy Assistant Commissioner for Patent Policy. (Plaintiffs' Exhibit 305-A; Tr. 82). For discussion of Mr. Singh's Declaration of Inventorship, see Tr. 98-102. ConAgra also inadvertently misrepresented this matter to the Federal Circuit in its Petition for Rehearing, *viz*: "The jury did not have Mr. Singh's oath (nor any part of the prosecution history) before it. . . ." (Appellant's Combined Pet. for Reh'g and Suggestion for Reh'g En Banc p. 13).

Throughout the trial ConAgra contended that its patented process for producing "golden brown" turkey breasts distinguished its process from Unitherm's. The Federal Circuit might have found it of interest to know that Unitherm had a refrigerated cooler in the courtroom during trial that was filled with "golden brown" turkey breasts produced by various vendors. The jury reviewed the turkey breasts at various times during the trial. (*See, e.g.*, Tr. 240, 304, 407).

(Pet. App. 47a). In fact, Plaintiffs' Exhibit 73 is a detailed six-page *economic analysis* of the benefits of the Unitherm system prepared for Bob Wood, Senior Vice-President of Operations of Jennie-O (Tr. 333), by Jeff Dierenfeld, the manufacturing engineer at Jennie-O. (Tr. 284). In considering shifting from the standard batch oven process to the Unitherm Process, Bob Wood had asked for "*economic justifications*" for Jennie-O's proposed expenditure of approximately $700,000 to acquire the Unitherm Process. (Tr. 347-351). Touting the "much more efficient system", Dierenfeld stated, "I am estimating total annual savings at $2,372,325. This is a conservative number based on $1.42 breast meat."[30] (Plaintiffs' Exhibit 73). Whether the Federal Circuit would have considered this evidence to be sufficient on the issue is unknowable, but it should at least have had this proof before it in assessing sufficiency of the evidence.[31]

With regard to the question on certiorari, it is unnecessary to extend the discussion of other factual errors by the Federal Circuit. The actual proof of record illustrates the importance, for principled appellate review, of having the trial court conduct

---

[30] Of course, it seems only intuitive that food processors would not make capital expenditures of $700,000-$800,000 if the economic benefits did not justify them.

[31] The Federal Circuit's parenthetical comment ". . . , *or at least the relevant excerpts in the appellate record*," indicates its own awareness of its inability to review the entire record. (Pet. App. 46a; emphasis added). The Federal Circuit did not have the testimony of ConAgra's vice president of research and development (Chris Salm) about ConAgra's consideration of costs in converting to the patented process. (Tr.1128). In terms of injury to competition, the Federal Circuit did not have the testimony of ConAgra's engineering expert, Bobby Clary:

> Q. Were you advised by Stein [an oven manufacturing competitor of Unitherm's] that it had a dramatic sales loss because of the patent that's at issue in this case?
>
> A. Yes.

(Tr. 1294).

post-verdict analysis if the verdict loser is going to argue insufficiency of the evidence on appeal. Here, out of the trial transcript of 1,521 pages, *not* including depositions read at trial, only 456 pages were reproduced in the Joint Appendix. The Federal Circuit was not aware that these educated jurors (4 of the 8 jurors had Masters Degrees and one had a Ph.D. (R. A3125-30)) were permitted to take notes during trial (Tr. 118), and did so with great care. After receiving the final verdict in open court on punitive damages, the trial court addressed the jury:

> You have worked very hard taking more notes than any jury I've ever seen, worked hard and long into the night, and you have provided an answer to this dispute which couldn't have been answered without you.

(Tr. 1519). The Federal Circuit also did not know that the jury conducted interim deliberations during trial. (Tr. 43, 119-20). Or that Unitherm's damages expert, Jeff Kinrich, used large demonstrative charts to describe Unitherm's damages to the jury. (Tr. 1049, 1052). In short, all the reasons articulated by the Federal Circuit in *Biodex* for requiring a post-verdict motion for JMOL to preserve issues of alleged insufficiency of the evidence for appellate review, are manifest here. This Court has long recognized that it is not the province of the courts to disregard the jury's factual findings. In reversing the judgment of the court of appeals and affirming the trial court's judgment, this Court stated in *Berry v. United States*, 312 U.S. 450, 453 (1941):

> But [Rule 50(b)] has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact - a jury being the constitutional tribunal provided for trying facts in courts of law.

CONCLUSION

Where an appellate court is at its weakest is in assessing the sufficiency of the evidence to support a jury verdict. The very nature of the task renders the trial court better suited to perform it. As this Court observed in *Cone*, requiring the verdict loser to renew a motion for JMOL under Rule 50(b) "calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." Such requirement is the jurisprudence of the "vast majority" of the circuit courts of appeal. Unitherm submits that such a requirement will always sharpen the issues and result in better informed and better reasoned appellate decisions.

Here, the trial court did not — indeed, could not — commit error by denying ConAgra's pre-verdict motion for directed verdict. It was incumbent upon ConAgra to renew such motion post-judgment setting forth with *specificity* "the law and the facts" on which it relied in order to preserve sufficiency of the evidence for appellate review. ConAgra's failure to do so waived appellate review of the issue. The trial court's judgment on the verdict of this conscientious and attentive jury should be affirmed.

Unitherm respectfully submits that the judgment of the Federal Circuit should be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

BURCK BAILEY
Counsel of Record
GREG A. CASTRO
JAY P. WALTERS
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
100 North Broadway
Suite 1700
Oklahoma City, OK 73012-8820
(405) 232-0621

DENNIS D. BROWN
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
321 South Boston
Suite 800
Tulsa, OK 74103-3318
(918) 599-0621

Attorneys for Petitioner

(6)

No. 04-597

FILED
SEP 15 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT-ECKRICH, INC., DOING BUSINESS AS CONAGRA REFRIGERATED FOODS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

SUPPLEMENTAL BRIEF

ROBERT A. SCHROEDER
Counsel of Record
JOHN R. REESE
LEIGH OTUSKA CURRAN
ROBERT C. HORTON
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue,
Suite 4400
Los Angeles, California 90071
(213) 680-6400

JOHN P. PASSARELLI
DAVID H. ROE
MCGRATH NORTH MULLIN & KRATZ PC LLO
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.6 STATEMENT

The parent company of Respondent Swift-Eckrich, Inc., now doing business as ConAgra Refrigerated Foods Food Company ("ConAgra") is ConAgra Foods, Inc., which is a publicly traded company that owns more than 10% of ConAgra's stock.

TABLE OF CONTENTS

Page

SUPPLEMENTAL BRIEF 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES:

Davis v. United States, 417 U.S. 333 (1974) 6

Grigsby v. Barnhart, 294 F.3d 1215 (10th Cir. 2002) 6

Litton Sys. v. Honeywell, Inc., 238 F.3d 1376 (Fed. Cir. 2001) 6

Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) 1

Phillips v. AWH Corp., 415 F.3d 1303 (Fed. Cir. 2005) 1, 5

Tex. Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193 (Fed. Cir. 2002) 2, 4

Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341 (Fed. Cir. 2004) 2, 3

RULES:

Fed. R. Civ. P. 50 6

Fed. R. Civ. P. 50(a) 5

Fed. R. Civ. P. 50(b) 5

SUPPLEMENTAL BRIEF

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.

Respondent, Swift-Eckrich, Inc. (referred to in these proceedings as "ConAgra") submits this supplemental brief under this Court's Rule 25(5). Oral argument is set for November 2, 2005.

The limited purpose of this brief is to ask this Court, at the conclusion of its review, to remand the case to the United States Court of Appeals for the Federal Circuit for reconsideration in view of a change in Federal Circuit law that is crucial to the substantive issues in the case. The issue as to which ConAgra will seek reconsideration on remand is not pertinent to the procedural question for which certiorari has been granted, but is potentially dispositive of this case as to all causes of action. Accordingly, ConAgra asks that the case be remanded without entering a final judgment, **regardless of this Court's ruling on the questions before it**.

As in most patent-related cases, the construction of the patent claims – a matter of law – is potentially dispositive here. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 391 (1996). Claim construction was essential to the determination that there was fraud on the Patent Office. This determination, in turn, was essential to the verdicts on both the antitrust and interference with prospective economic advantage verdicts.

The new authority that necessitates this brief, *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (*en banc*), was decided on July 12, 2005, just three days before ConAgra filed its brief in this Court. ConAgra inserted a short footnote 5 referencing *Phillips*, but had no time to do more before the brief went to the printer. (Resp. Brief 6.)

Prior to *Phillips*, a line of Federal Circuit cases had diverged from long-established precedent and greatly restricted reliance on the patent specification when construing claims, essentially limiting resort to the specification to those patents in which the meaning of a claim term was **explicitly** set forth in a formal definition. These cases prohibited reliance on the specification when the meaning of the claims could be derived only from the way a term was used or other relevant statements in the specification. This "dictionary first" approach to claim construction had reached its zenith in *Tex. Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1204 (Fed. Cir. 2002).

In this case, the Federal Circuit quoted extensively from *Texas Digital* and rigidly followed its "dictionary first" approach, thus affirming the district court's claim construction without reference to the patent specification. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1352 (Fed. Cir. 2004). It held that there was a "presumption" in favor of the plain meaning of the crucial claim term "golden brown," which was equated with a dictionary definition. *Id.* at 1351. It further held that to overcome this presumption:

> ConAgra must demonstrate that the intrinsic evidence provides both a clear and explicit disclaimer of the plain meaning and substitutes a more specific, technical construction of "golden brown." *See Tex. Digital*, 308 F.3d at 1203. ConAgra's suggestion that we glean numeric ranges from examples [in the specification] represents neither clear nor **explicit** disavowal of the common meaning.

Id. (emphasis added).

Based on an extremely broad claim construction arrived at in this way, the Federal Circuit compared the claim scope to the prior art and held as follows:

> The first element of the alleged fraud was ConAgra's relevant material representation to the PTO that Prem Singh **invented the claimed process**, and that he neither used it in public nor offered it for sale prior to May 11, 1997.
>
> * * *
>
> David Howard invented the **process claimed by the '027 Patent** no later than 1993, and both used it and sold it numerous times prior to the critical date – thereby rendering the '027 Patent invalid under §102(b).

Id. at 1359 (emphasis added).

Not only was ConAgra's patent held invalid, but the Federal Circuit also extended the *Texas Digital* claim construction methodology beyond issues of patent validity and infringement to find fraud on the Patent Office. *Id.* Specifically, it found ConAgra intentionally claimed the prior art without considering that the patent specification acknowledges that the process attributed to David Howard was part of the prior art. *Id.* at 1359-1363.

ConAgra petitioned for rehearing, arguing that "the decision in this case should be reconsidered **after and in light of the [then upcoming] en banc decision in *Phillips*.**" (Pet. for Reh'g 8) (emphasis added). The Federal Circuit denied the petition and this Court then granted certiorari on a different issue.

Thereafter, the Federal Circuit reconsidered *Phillips en banc* and rejected the claim construction rules of *Texas Digital*:

> Although the concern expressed by the court in *Texas Digital* was valid, the methodology it adopted placed too much reliance on extrinsic sources such as dictionaries, treatises, and encyclopedias and too little on intrinsic sources, in particular the specification and prosecution history. While the court noted that the specification must be consulted in every case, it suggested a methodology for claim interpretation in which the specification should be consulted only after a determination is made, whether based on a dictionary, treatise, or other source, as to the ordinary meaning or meanings of the claim term in dispute. Even then, recourse to the specification is limited to determining whether the specification excludes one of the meanings derived from the dictionary, whether the presumption in favor of the dictionary definition of the claim term has been overcome by "an explicit definition of the term different from its ordinary meaning," or whether the inventor "has disavowed or disclaimed scope of coverage, by using words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope." 308 F.3d at 1204. In effect, the *Texas Digital* approach limits the role of the specification in claim construction to serving as a check on the dictionary meaning of a claim term if the specification requires the court to conclude that fewer than all the dictionary definitions apply, or if the specification contains a sufficiently specific alternative definition or disavowal. *See, e.g. Texas Digital*, 308 F.3d at 1202 ("unless compelled otherwise, a court will give a claim term the full range of its

> ordinary meaning") (other citations omitted). **That approach, in our view, improperly restricts the role of the specification in claim construction**. (Emphasis added.)
>
> * * *
>
> Although the *Texas Digital* line of cases permit the dictionary definition to be narrowed in some circumstances even when there is not an explicit disclaimer or redefinition in the specification, too often that line of cases has been improperly relied upon to condone the adoption of a dictionary definition entirely divorced from the context of the written description. The problem is that if the district court starts with the broad dictionary definition in every case and fails to fully appreciate how the specification **implicitly limits** that definition, the error will systematically cause the construction of the claim to be unduly expansive.

Phillips, 415 F.3d at 1320-21 (emphasis added).

If the Federal Circuit had used the claim construction approach of *Phillips en banc*, and not that of *Texas Digital*, the outcome of this case would have been different in two ways. First, the claims in the patent could not have been interpreted to cover a process that ConAgra acknowledged in the specification was part of the prior art. Second, the dictionary definition of the claim limitation "golden brown" could not have been adopted without considering the numerically defined examples in the specification.

We note that if ConAgra had not made any motion under Fed. R. Civ. P. 50(a) or (b), thus eliminating the issue now before this Court, that would not have affected ConAgra's appeal of the finding of fraud, which was based on an overbroad, dictionary-first claim construction. In

other words, if the claim construction were changed as a matter of law, the Rule 50 issues could be mooted.

If this Court affirms the Federal Circuit's decision, that result literally requires remand to the district court for further proceedings, which would leave the district court to grapple with the effect of *Phillips* on those proceedings. On the other hand, if this Court reverses, then the case should be remanded for consideration of plain error, a task best performed by the court of appeals. If this Court upholds sufficiency of the evidence review and rules that the court of appeals should have directed entry of judgment for ConAgra on the antitrust claim, that would still leave the $4,000,000 interference judgment standing although it rests on a claim construction that is erroneous as a matter of law. The solution to all these problems is to remand the case to the Federal Circuit to consider how the recent change of law affects this case.

It may be argued that the prior Federal Circuit claim construction is now the law of the case and should not, therefore, be revisited. However, the law of the case does not control in the face of a change in the applicable law. *Davis v. United States*, 417 U.S. 333, 342 (1974). In *Litton Sys. v. Honeywell, Inc.*, 238 F.3d 1376 (Fed. Cir. 2001), the Federal Circuit held that a subsequent change in the law compelled a conclusion that the patentee's reliance on the doctrine of equivalents was **not** permissible and there was, therefore, no infringement, despite an earlier decision to the contrary in the same case. As for the law of the case, the Federal Circuit said, "[w]e are aware of no decision of this court that has applied the law of the case in the face of a relevant change in controlling legal authority." *Id.* at 1380; *see also Grigsby v. Barnhart*, 294 F.3d 1215, 1219

(10th Cir. 2002) (a contrary decision of applicable law creates an exception to law of the case doctrine).

CONCLUSION

Whatever this Court's decision on the Rule 50 issue before it, this case should be remanded to the Federal Circuit for further reconsideration in light of the intervening change in controlling authority.

Respectfully submitted,

JOHN P. PASSARELLI
DAVID H. ROE
McGRATH NORTH MULLIN & KRATZ PC LLO
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070

ROBERT A. SCHROEDER
Counsel of Record
JOHN R. REESE
LEIGH OTSUKA CURRAN
ROBERT C. HORTON
BINGHAM McCUTCHEN LLP
355 South Grand Avenue
Suite 4400
Los Angeles, CA 90071
(213) 680-6400

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITHERM FOOD SYSTEMS, INC. *v.* SWIFT-ECKRICH, INC., DBA CONAGRA REFRIGERATED FOODS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 04–597. Argued November 2, 2005—Decided January 23, 2006

After respondent ConAgra warned companies selling equipment and processes for browning precooked meats that it intended to protect its rights under its patent for that process, petitioner Unitherm, whose president had invented the process six years before ConAgra filed its patent application, and one of ConAgra's direct competitors jointly filed suit in an Oklahoma federal court. As relevant here, they sought a declaration that ConAgra's patent was invalid and unenforceable and alleged that ConAgra had violated §2 of the Sherman Act by attempting to enforce a patent obtained by fraud on the Patent and Trademark Office, see *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 174. The District Court found the patent invalid and allowed the *Walker Process* claim to proceed to trial. Before the case was submitted to the jury, ConAgra moved for a directed verdict under Federal Rule of Civil Procedure 50(a) based on legal insufficiency of the evidence. The court denied the motion, the jury returned a verdict for Unitherm, and ConAgra neither renewed its motion for judgment as a matter of law pursuant to Rule 50(b) nor moved for a new trial on antitrust liability pursuant to Rule 59. On appeal to the Federal Circuit, ConAgra maintained that there was insufficient evidence to sustain the *Walker Process* verdict. The court applied Tenth Circuit law, under which a party that has failed to file a postverdict sufficiency of the evidence challenge may nonetheless raise such a claim on appeal, so long as the party filed a Rule 50(a) motion before submission of the case to the jury. The only available relief in such a circumstance is a new trial. Freed to examine the sufficiency of the evidence, the Federal Circuit

vacated the judgment and ordered a new trial.

Held: Since respondent failed to renew its preverdict motion as specified in Rule 50(b), the Federal Circuit had no basis for reviewing respondent's sufficiency of the evidence challenge. Rule 50 sets forth the requirements, establishing two stages, for challenging the sufficiency of the evidence in a civil jury trial. Rule 50(a) allows a challenge prior to the case's submission to the jury, authorizing the district court to grant the motion at the court's discretion. Rule 50(b), by contrast, sets forth the requirements for renewing the challenge after the jury verdict and entry of judgment. A party's failure to file a Rule 50(b) postverdict motion deprives an appellate court of the "power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 218. It also deprives an appellate court of the power to order the entry of judgment in favor of that party where the district court directed the jury's verdict, *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, and where the district court expressly reserved a party's preverdict directed verdict motion and then denied it after the verdict, *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48. A postverdict motion is necessary because determining "whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone*, *supra*, at 216. Moreover, the requirement "is not an idle motion" but "an essential part of the rule, firmly grounded in principles of fairness." *Johnson*, *supra*, at 53. These authorities require reversal of the judgment below. This Court's observations about the postverdict motion's necessity and the benefits of the district court's input at that stage apply with equal force whether a party is seeking judgment as a matter of law or simply a new trial. Contrary to respondent's argument, the *Cone*, *Globe Liquor*, and *Johnson* outcomes underscore this holding. Those litigants all secured new trials, but they had moved for a new trial postverdict in the district court and did not seek to establish their entitlement to a new trial based solely on a denied Rule 50(a) motion. This result is further validated by the purported basis of respondent's appeal, namely the District Court's denial of its Rule 50(a) motion. *Cone*, *Globe Liquor*, and *Johnson* unequivocally establish that the precise subject matter of a party's Rule 50(a) motion cannot be appealed unless that motion is renewed pursuant to Rule 50(b). Respondent, rather than seeking to appeal the claim raised in its Rule 50(a) motion, seeks a *new trial* based on legal insufficiency of the evidence. If a litigant that has failed to file a Rule 50(b) motion is foreclosed from seeking the relief sought in its Rule 50(a) motion, then surely re-

Syllabus

spondent is foreclosed from seeking relief it did not and could not seek in its preverdict motion. Rule 50(b)'s text confirms that respondent's Rule 50(a) motion did not give the District Court the option of ordering a new trial, for it provides that a district court may only order a new trial based on issues raised in a Rule 50(a) motion when "ruling on a renewed motion" under Rule 50(b). If the District Court lacked such power, then the Court of Appeals was similarly powerless. Rule 50(a)'s text and application also support this result. A district court may enter judgment as a matter of law when it concludes that the evidence is legally insufficient, but it is not required to do so. Thus, the denial of respondent's Rule 50(a) motion was not error, but merely an exercise of the District Court's discretion. Pp. 4–12.

375 F. 3d 1341, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and O'CONNOR, SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which KENNEDY, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–597

UNITHERM FOOD SYSTEMS, INC., PETITIONER *v.* SWIFT-ECKRICH, INC., DBA CONAGRA REFRIGERATED FOODS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[January 23, 2006]

JUSTICE THOMAS delivered the opinion of the Court.

Ordinarily, a party in a civil jury trial that believes the evidence is legally insufficient to support an adverse jury verdict will seek a judgment as a matter of law by filing a motion pursuant to Federal Rule of Civil Procedure 50(a) before submission of the case to the jury, and then (if the Rule 50(a) motion is not granted and the jury subsequently decides against that party) a motion pursuant to Rule 50(b). In this case, however, the respondent filed a Rule 50(a) motion before the verdict, but did not file a Rule 50(b) motion after the verdict. Nor did respondent request a new trial under Rule 59. The Court of Appeals nevertheless proceeded to review the sufficiency of the evidence and, upon a finding that the evidence was insufficient, remanded the case for a new trial. Because our cases addressing the requirements of Rule 50 compel a contrary result, we reverse.

I

The genesis of the underlying litigation in this case was ConAgra's attempt to enforce its patent for "A Method for

Browning Precooked Whole Muscle Meat Products," U. S. Patent No. 5,952,027 ('027 patent). In early 2000, ConAgra issued a general warning to companies who sold equipment and processes for browning precooked meats explaining that it intended to "'aggressively protect all of [its] rights under [the '027] patent.'" 375 F. 3d 1341, 1344 (CA Fed. 2004). Petitioner Unitherm sold such processes, but did not receive ConAgra's warning. ConAgra also contacted its direct competitors in the precooked meat business, announcing that it was "'making the '027 Patent and corresponding patents that may issue available for license at a royalty rate of 10¢ per pound.'" *Id.*, at 1345. Jennie-O, a direct competitor, received ConAgra's correspondence and undertook an investigation to determine its rights and responsibilities with regard to the '027 patent. Jennie-O determined that the browning process it had purchased from Unitherm was the same as the process described in the '027 patent. Jennie-O further determined that the '027 patent was invalid because Unitherm's president had invented the process described in that patent six years before ConAgra filed its patent application.

Consistent with these determinations, Jennie-O and Unitherm jointly sued ConAgra in the Western District of Oklahoma. As relevant here, Jennie-O and Unitherm sought a declaration that the '027 patent was invalid and unenforceable, and alleged that ConAgra had violated §2 of the Sherman Act, 15 U. S. C. §2, by attempting to enforce a patent that was obtained by committing fraud on the Patent and Trademark Office (PTO). See *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 174 (1965) (holding that "the enforcement of a patent procured by fraud on the Patent Office may be violative of §2 of the Sherman Act provided the other elements necessary to a §2 case are present"). The District Court construed the '027 patent and determined that it was invalid based on Unitherm's prior public use and sale of the

process described therein. 35 U. S. C. §102(b). After dismissing Jennie-O for lack of antitrust standing, the District Court allowed Unitherm's *Walker Process* claim to proceed to trial. Prior to the court's submission of the case to the jury, ConAgra moved for a directed verdict under Rule 50(a) based on legal insufficiency of the evidence. The District Court denied that motion.[1] The jury returned a verdict for Unitherm, and ConAgra neither renewed its motion for judgment as a matter of law pursuant to Rule 50(b), nor moved for a new trial on antitrust liability pursuant to Rule 59.[2]

On appeal to the Federal Circuit, ConAgra maintained that there was insufficient evidence to sustain the jury's *Walker Process* verdict. Although the Federal Circuit has concluded that a party's "failure to present the district court with a post-verdict motion precludes appellate review of sufficiency of the evidence," *Biodex Corp.* v. *Loredan Biomedical, Inc.*, 946 F. 2d 850, 862 (1991), in the instant case it was bound to apply the law of the Tenth Circuit. 375 F. 3d, at 1365, n. 7 ("On most issues related to Rule 50 motions . . . we generally apply regional circuit law unless the precise issue being appealed pertains uniquely to patent law"). Under Tenth Circuit law, a party that has failed to file a postverdict motion challeng-

---

[1] Petitioner contends that respondent's Rule 50(a) motion pertained only to the fraud element of petitioner's *Walker Process* claim, and that it did not encompass the remaining antitrust elements of that claim. Because we conclude that petitioner is entitled to prevail irrespective of the scope of respondent's Rule 50(a) motion, we assume without deciding that that motion pertained to all aspects of petitioner's §2 claim. But see Amendments to Federal Rules of Civil Procedure, 134 F. R. D. 525, 687 (1991) ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion").

[2] While ConAgra did file a postverdict motion seeking a new trial on antitrust damages, that motion did not seek to challenge the sufficiency of the evidence establishing antitrust liability and thus has no bearing on the instant case.

ing the sufficiency of the evidence may nonetheless raise such a claim on appeal, so long as that party filed a Rule 50(a) motion prior to submission of the case to the jury. *Cummings* v. *General Motors Corp.*, 365 F. 3d 944, 950–951 (2004). Notably, the only available relief in such a circumstance is a new trial. *Id.*, at 951.

Freed to examine the sufficiency of the evidence, the Federal Circuit concluded that, although Unitherm had presented sufficient evidence to support a determination that ConAgra had attempted to enforce a patent that it had obtained through fraud on the PTO, 375 F. 3d, at 1362, Unitherm had failed to present evidence sufficient to support the remaining elements of its antitrust claim. *Id.*, at 1365 ("Unitherm failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its Section 2 claim"). Accordingly, it vacated the jury's judgment in favor of Unitherm and remanded for a new trial. We granted certiorari, 543 U. S. 1186 (2005), and now reverse.

II

Federal Rule of Civil Procedure 50 sets forth the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial and establishes two stages for such challenges—prior to submission of the case to the jury, and after the verdict and entry of judgment. Rule 50(a) allows a party to challenge the sufficiency of the evidence prior to submission of the case to the jury, and authorizes the District Court to grant such motions at the court's discretion:

> "(a) JUDGMENT AS A MATTER OF LAW.
>
> "(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judg-

ment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

"(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

Rule 50(b), by contrast, sets forth the procedural requirements for renewing a sufficiency of the evidence challenge after the jury verdict and entry of judgment.

"(b) RENEWING MOTION FOR JUDGMENT AFTER TRIAL; ALTERNATIVE MOTION FOR NEW TRIAL. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

"(1) if a verdict was returned:

"(A) allow the judgment to stand,

"(B) order a new trial, or

"(C) direct entry of judgment as a matter of law . . . ."

This Court has addressed the implications of a party's failure to file a postverdict motion under Rule 50(b) on several occasions and in a variety of procedural contexts. This Court has concluded that, "[i]n the absence of such a motion" an "appellate court [is] without power to direct the

District Court to enter judgment contrary to the one it had permitted to stand." *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 218 (1947). This Court has similarly concluded that a party's failure to file a Rule 50(b) motion deprives the appellate court of the power to order the entry of judgment in favor of that party where the district court directed the jury's verdict, *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948), and where the district court expressly reserved a party's preverdict motion for a directed verdict and then denied that motion after the verdict was returned. *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952). A postverdict motion is necessary because "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."[3] *Cone*, *supra*, at 216. Moreover, the "requirement of a timely application for judgment after verdict is not an idle motion" because it "is . . . an essential part of the rule, firmly grounded in principles of fairness." *Johnson*, *supra*, at 53.

The foregoing authorities lead us to reverse the judgment below. Respondent correctly points out that these authorities address whether an appellate court may enter judgment in the absence of a postverdict motion, as op-

---

[3] Neither *Neely* v. *Martin K. Eby Constr. Co.*, 386 U. S. 317 (1967), nor *Weisgram* v. *Marley Co.*, 528 U. S. 440 (2000), undermine our judgment about the benefit of postverdict input from the district court. In those cases this Court determined that an appellate court may, in certain circumstances, direct the entry of judgment when it reverses the district court's denial of a Rule 50(b) motion. But in such circumstances the district court will have had an opportunity to consider the propriety of entering judgment or ordering a new trial by virtue of the postverdict motion. Moreover, these cases reiterate the value of the district court's input, cautioning the courts of appeals to be "'constantly alert' to 'the trial judge's first-hand knowledge of witnesses, testimony, and issues.'" *Id.*, at 443 (quoting *Neely*, *supra*, at 325).

posed to whether an appellate court may order a new trial (as the Federal Circuit did here). But this distinction is immaterial. This Court's observations about the necessity of a postverdict motion under Rule 50(b), and the benefits of the district court's input at that stage, apply with equal force whether a party is seeking judgment as a matter of law or simply a new trial. In *Cone*, this Court concluded that, because Rule 50(b) permits the district court to exercise its discretion to choose between ordering a new trial and entering judgment, its "appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a *new trial* should be granted." 330 U. S., at 216 (emphasis added). Similarly, this Court has determined that a party may only pursue on appeal a particular avenue of relief available under Rule 50(b), namely the entry of judgment *or a new trial*, when that party has complied with the Rule's filing requirements by requesting that particular relief below. See *Johnson*, *supra*, at 54 ("Respondent made a motion to set aside the verdict and for new trial within the time required by Rule 50(b). It failed to comply with permission given by 50(b) to move for judgment *n. o. v.* after the verdict. In this situation respondent is entitled only to a new trial, not to a judgment in its favor").[4]

---

[4]The dissent's suggestion that 28 U. S. C. §2106 permits the Courts of Appeals to consider the sufficiency of the evidence underlying a civil jury verdict notwithstanding a party's failure to comply with Rule 50 is foreclosed by authority of this Court. While the dissent observes that §2106 was enacted after *Cone* and *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948), *post*, at 2 (opinion of STEVENS, J.), it fails to note that it was enacted prior to *Johnson*. *Johnson* explicitly reaffirmed those earlier cases, concluding that "in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict [Rule 50] forbids the trial judge or an appellate court to enter such judgment." 344 U. S., at 50. Moreover, in *Neely*, this Court observed that §2106 is "broad enough to include the power to direct entry of judgment *n. o. v.* on appeal." 386 U. S., at 322.

Despite the straightforward language employed in *Cone*, *Globe Liquor*, and *Johnson*, respondent maintains that those cases dictate affirmance here, because in each of those cases the litigants secured a new trial. But in each of those cases the appellants moved for a new trial post-verdict in the District Court, and did not seek to establish their entitlement to a new trial solely on the basis of a denied Rule 50(a) motion. See *Cone*, *supra*, at 213 (noting that respondent moved for a new trial);[5] *Globe Liquor*, 332

---

but nonetheless reaffirmed that *Cone*, *Globe Liquor*, and *Johnson* "make it clear that an appellate court may not order judgment *n. o. v.* where the verdict loser has failed to strictly comply with the procedural requirements of Rule 50(b)." 386 U. S., at 325. Contrary to the dissent's suggestion, *Neely* confirms that the broad grant of authority to the Courts of Appeals in §2106 must be exercised consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by this Court.

The dissent's approach is not only foreclosed by authority of this Court, it also may present Seventh Amendment concerns. The implication of the dissent's interpretation of §2106 is that a court of appeals would be free to examine the sufficiency of the evidence regardless of whether the appellant had filed a Rule 50(a) motion in the district court and, in the event the appellant had filed a Rule 50(a) motion, regardless of whether the district court had ever *ruled* on that motion. The former is squarely foreclosed by *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364 (1913), and the latter is inconsistent with this Court's explanation of the requirements of the Seventh Amendment in *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 658 (1935) (explaining that "under the pertinent rules of the common law the court of appeals could set aside the verdict for error of law, such as the trial court's *ruling* respecting the sufficiency of the evidence, and direct a new trial, but could not itself determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury" (emphasis added)). Indeed, Rule 50 was drafted with such concerns in mind. See 9A C. Wright & A. Miller, Federal Practice and Procedure §2522, pp. 244–246 (2d ed. 1995) (hereinafter Federal Practice).

[5]While the precise nature of the new trial motion at issue in *Cone* is difficult to ascertain from this Court's description of that motion, the Court of Appeals opinion in that case confirms that the movant had properly objected to the admission of certain evidence, and then moved

U. S., at 572 ("The respondents . . . moved for a new trial on the ground . . . that there were many contested issues of fact"). Indeed, *Johnson* concluded that respondent was *only* entitled to a new trial by virtue of its motion for such "within the time required by Rule 50(b)." 344 U. S., at 54. Accordingly, these outcomes merely underscore our holding today—a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court.

Our determination that respondent's failure to comply with Rule 50(b) forecloses its challenge to the sufficiency of the evidence is further validated by the purported basis of respondent's appeal, namely the District Court's denial of respondent's preverdict Rule 50(a) motion. As an initial matter, *Cone*, *Globe Liquor*, and *Johnson* unequivocally establish that the precise subject matter of a party's Rule 50(a) motion—namely, its entitlement to judgment as a matter of law—cannot be appealed unless that motion is renewed pursuant to Rule 50(b). Here, respondent does not seek to pursue on appeal the precise claim it raised in its Rule 50(a) motion before the District Court—namely, its entitlement to judgment as a matter of law. Rather, it seeks a *new trial* based on the legal insufficiency of the evidence. But if, as in *Cone*, *Globe Liquor*, and *Johnson*, a litigant that has failed to file a Rule 50(b) motion is foreclosed from seeking the relief it sought in its Rule 50(a) motion—*i.e.*, the entry of judgment—then surely respondent is foreclosed from seeking a new trial, relief it did not and could not seek in its preverdict motion. In short,

---

postverdict "for a new trial [on the basis of the inadmissible evidence] and later renewed this motion upon the basis of newly-discovered evidence." *West Virginia Pulp & Paper Co.* v. *Cone*, 153 F. 2d 576, 580 (CA1 1946). This Court did not disturb the Court of Appeals holding that formed the basis of the movant's entitlement to a new trial, namely "the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence." 330 U. S., at 215.

respondent never sought a new trial before the District Court, and thus forfeited its right to do so on appeal. *Yakus* v. *United States*, 321 U. S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a . . . right may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it").

The text of Rule 50(b) confirms that respondent's preverdict Rule 50(a) motion did not present the District Court with the option of ordering a new trial. That text provides that a district court may only order a new trial on the basis of issues raised in a preverdict Rule 50(a) motion when "ruling on a renewed motion" under Rule 50(b). Accordingly, even if the District Court was inclined to grant a new trial on the basis of arguments raised in respondent's preverdict motion, it was without the power to do so under Rule 50(b) absent a postverdict motion pursuant to that Rule. Consequently, the Court of Appeals was similarly powerless.

Similarly, the text and application of Rule 50(a) support our determination that respondent may not challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its Rule 50(a) motion. The Rule provides that "the court *may* determine" that "there is no legally sufficient evidentiary basis for a reasonable jury to find for [a] party on [a given] issue," and "*may* grant a motion for judgment as a matter of law against that party . . . ." (Emphasis added.) Thus, while a district court is permitted to enter judgment as a matter of law when it concludes that the evidence is legally insufficient, it is not required to do so. To the contrary, the district courts are, if anything, encouraged to submit the case to the jury, rather than granting such motions. As Wright and Miller explain:

"Even at the close of all the evidence it may be de-

> sirable to refrain from granting a motion for judgment as a matter of law despite the fact that it would be possible for the district court to do so. If judgment as a matter of law is granted and the appellate court holds that the evidence in fact was sufficient to go to the jury, an entire new trial must be had. If, on the other hand, the trial court submits the case to the jury, though it thinks the evidence insufficient, final determination of the case is expedited greatly. If the jury agrees with the court's appraisal of the evidence, and returns a verdict for the party who moved for judgment as a matter of law, the case is at an end. If the jury brings in a different verdict, the trial court can grant a renewed motion for judgment as a matter of law. Then if the appellate court holds that the trial court was in error in is appraisal of the evidence, it can reverse and order judgment on the verdict of the jury, without any need for a new trial. For this reason the appellate courts repeatedly have said that it usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion." 9A Federal Practice §2533, at 319 (footnote omitted).

Thus, the District Court's denial of respondent's preverdict motion cannot form the basis of respondent's appeal, because the denial of that motion was not error. It was merely an exercise of the District Court's discretion, in accordance with the text of the Rule and the accepted practice of permitting the jury to make an initial judgment about the sufficiency of the evidence. The only error here was counsel's failure to file a postverdict motion pursuant to Rule 50(b).[6]

---

[6]Respondent claims that its failure to renew its Rule 50(a) motion was in reliance on the Tenth Circuit's determination that it could order a new trial in the absence of a Rule 50(b) motion. But respondent

* * *

For the foregoing reasons, we hold that since respondent failed to renew its preverdict motion as specified in Rule 50(b), there was no basis for review of respondent's sufficiency of the evidence challenge in the Court of Appeals. The judgment of the Court of Appeals is reversed.[7]

It is so ordered.

---

cannot credibly maintain that it wanted the Court of Appeals to order a new trial as opposed to entering judgment. And, as the Tenth Circuit has recognized, respondent could not obtain the entry of judgment unless it complied with Rule 50(b). *Cummings* v. *General Motors Corp.*, 365 F. 3d 944, 951 (2004). Respondent therefore had every incentive to comply with that Rule's requirements. Accordingly, we reject its contention that our application of Rule 50(b) to the instant case is impermissibly retroactive. See also *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86, 97 (1993) ("[W]e can scarcely permit the substantive law to shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule" (internal quotation marks and brackets omitted)).

[7]We reject respondent's contention that it is entitled to a remand for reconsideration in light of *Phillips* v. *AWH Corp.*, 415 F. 3d 1303 (CA Fed. 2005). The Federal Circuit has already denied respondent's petition for rehearing raising this issue.

SUPREME COURT OF THE UNITED STATES

No. 04–597

UNITHERM FOOD SYSTEMS, INC., PETITIONER *v.* SWIFT-ECKRICH, INC., DBA CONAGRA REFRIGERATED FOODS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[January 23, 2006]

JUSTICE STEVENS, with whom JUSTICE KENNEDY joins, dissenting.

Murphy's law applies to trial lawyers as well as pilots. Even an expert will occasionally blunder. For that reason Congress has preserved the federal appeals courts' power to correct plain error, even though trial counsel's omission will ordinarily give rise to a binding waiver. This is not a case, in my view, in which the authority of the appellate court is limited by an explicit statute or controlling rule. The spirit of the Federal Rules of Civil Procedure favors preservation of a court's power to avoid manifestly unjust results in exceptional cases. See *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48, 62 (1952) (Frankfurter, J., dissenting) ("'Procedure is the means; full, equal and exact enforcement of substantive law is the end'" (quoting Pound, The Etiquette of Justice, 3 Proceedings Neb. St. Bar Assn. 231 (1909))). Moreover, we have an overriding duty to obey statutory commands that unambiguously express the intent of Congress even in areas such as procedure in which we may have special expertise.

Today, relying primarily on a case decided in March 1947, *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, and a case decided in January 1948, *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, the Court holds that the

Court of Appeals was "powerless" to review the sufficiency of the evidence supporting the verdict in petitioner's favor because respondent failed to file proper postverdict motions pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure in the trial court. *Ante*, at 10. The majority's holding is inconsistent with a statute enacted just months after *Globe Liquor* was decided. That statute, which remains in effect today, provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U. S. C. §2106.

Nothing in Rule 50(b) limits this statutory grant of power to appellate courts; while a party's failure to make a Rule 50(b) motion precludes the *district court* from directing a verdict in that party's favor, the Rule does not purport to strip the courts of appeals of the authority to review district court judgments or to order such relief as "may be just under the circumstances." Nor do general principles of waiver or forfeiture have that effect. Cf. *ante*, at 9–10. It is well settled that a litigant's waiver or forfeiture of an argument does not, in the absence of a contrary statutory command, preclude the courts of appeals from considering those arguments. See *Singleton* v. *Wulff*, 428 U. S. 106, 121 (1976). Arguments raised for the first time on appeal may be entertained, for example, if their consideration would prevent manifest injustice. *Ibid.**

---

*The Court suggests that the Seventh Amendment limits appellate courts' power to review judgments under 28 U. S. C. §2106. See *ante*, at 7, n. 4. I disagree with the Court's analysis in two respects. First, although the right to trial by jury might be implicated if no Rule 50(a) motion had been made, such a motion *was* made in this case. The Rule

For the reasons articulated by the Court in *Cone*, 330 U. S., at 216, it may be unfair or even an abuse of discretion for a court of appeals to direct a verdict in favor of the party that lost below if that party failed to make a timely Rule 50(b) motion. Likewise, it may not be "just under the circumstances" for a court of appeals to order a new trial in the absence of a proper Rule 59 motion. Finally, a court of appeals has discretion to rebuff, on grounds of waiver or forfeiture, a challenge to the sufficiency of the evidence absent a proper Rule 50(b) or Rule 59 motion made in the district court. None of the foregoing propositions rests, however, on a determination that the courts of appeals lack "power" to review the sufficiency of the evidence and order appropriate relief under these circumstances, and I can divine no basis for that determination.

I respectfully dissent.

50(a) motion triggered the automatic reservation of "legal questions," Fed. Rule Civ. Proc. 50(b), and that reservation, in turn, averted any Seventh Amendment problem, see *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654 (1935). Second, the Seventh Amendment imposes no greater restriction on appellate courts than it does on district courts in these circumstances; "[a]s far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n. o. v.* than when a trial court does." *Neely* v. *Martin K. Eby Constr. Co.*, 386 U. S. 317, 322 (1967).